United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1904.

No. 1461.

JAMES W. WHELPLEY, GEORGE R. REPETTI, HENRY K. SIMPSON, JOHN E. HERRELL, ALEXANDER McKENZIE, CHARLES C. MEADS, CHARLES A. STOCKETT, JAMES E. HUTCHINSON, WILLIAM F. SLATER, SAMUEL H. WALKER, TRUSTEE, AND MICHAEL I. WELLER, TRUSTEE, APPELLANTS,

vs.

SAMUEL ROSS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1904.

In the Court of Appeals of the District of Columbia.

JAMES W. WHELPLEY ET AL., Appellants,
vs.
SAMUEL ROSS.
} No. 1461.

a Supreme Court of the District of Columbia.

SAMUEL Ross, Complainant,
vs.
JAMES W. WHELPLEY, GEORGE R. REPETTI, Henry K. Simpson, John E. Herrell, Alexander McKenzie, Charles C. Meads, Charles A. Stockett, James E. Hutchinson, William F. Slater, George W. Montgomery, Samuel H. Walker, Trustee, and Michael I. Weller, Trustee, Defendants.
} No. 24253. In Equity.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit :—

1 *Bill, &c.*

Filed October 21, 1903.

In the Supreme Court of the District of Columbia.

SAMUEL ROSS
vs.
JAMES W. WHELPLEY, GEORGE R. REPETTI, Henry K. Simpson, John E. Herrell, Alexander McKenzie, Charles C. Meads, Charles A. Stockett, James E. Hutchinson, William F. Slater, George W. Montgomery, Samuel H. Walker, Trustee, and Michael I. Weller, Trustee.
} Equity. No. 24253.

The petition of Samuel Ross respectfully shows as follows:

1. Complainant is a citizen and resident of the District of Columbia and brings this suit in his own right.

2. The defendants James W. Whelpley, George R. Repetti, Henry K. Simpson, John E. Herrell, Alexander McKenzie, Charles C. Meads, Charles R. Stockett, James E. Hutchinson and William F. Slater are the directors of a certain joint stock company or voluntary association organized and doing business in the District of Columbia known as the Eastern Building and Loan Association, and are sued in their own right and as the representatives of the said association, the entire membership of the said association being too numerous to join in this cause and the names and addresses of the other members and the amount of their holdings and the nature thereof being unknown to your complainant.

2 3. The defendant George W. Montgomery is a citizen and resident of the District of Columbia, and is sued in his own right.

4. Samuel H. Walker and Michael I. Weller are citizens and residents of the District of Columbia and are sued as trustees under a certain deed of trust as will hereafter appear.

5. The said Eastern Building and Loan Association, as part of its business, is engaged in loaning money on real estate security; that on the 13th day of March, 1893, the defendant George W. Montgomery borrowed from the said association the sum of twenty-two hundred dollars ($2200.00) and to secure the payment of the same executed a deed of trust to the defendants Samuel H. Walker and Michael I. Weller, trustees, on parts of lots twenty-three (23) and twenty-four (24) in B. P. Watrous' subdivision of part of block seven (7), of "Trinidad" as the same is recorded in County Book 7, page 5 of the surveyor's records of this District, and particularly described as follows:—Beginning for the same at a point on east 12th street extending twenty-nine feet south of the northeast corner of lot twenty-three (23), running thence south along the east line of said lot seventeen (17) feet, thence at right angles ninety (90) feet, thence north along the west line of said lot seventeen (17) feet, thence, east ninety (90) feet to the beginning, being the south eleven feet of twenty-three and the north six feet of lot twenty-four. The said deed of trust was dated the 13th day of March, 1893, and was recorded March 16th, 1893, in Liber 1784, folio 260 of the land records of this District, a copy whereof is hereto annexed marked "Exhibit No. 1" and prayed to be read as a part hereof. As

3 evidence of the said debt the said Montgomery on the said 13th day of March, 1893, executed a certain instrument in writing, or bond, in the penalty of twenty-two hundred ($2200.00) dollars, a copy of which is filed herewith marked "Exhibit No. 2, and prayed to be read as a part hereof.

6. That the said Montgomery in making the said loan and in executing the said trust and the said bond acted as the agent for your complainant and has no beneficial interest in the said property; that your complainant is the equitable owner of the said property and has paid all the dues due under the said loan to the said association.

7. Your complainant further says that the said loan of twenty-two hundred dollars ($2200.00) was made by the said association at a "premium" of seventy cents per share and that he was required to take eleven shares of stock in the said association and was required to pat principal, interest and "premium" thereon until the value of the said stock should reach two hundred dollars per share; that from the date of the said loan he has paid monthly into the said association the sum of eleven dollars as principal, the sum of eleven dollars as interest and the sum of seven 70/100 dollars as "premium," making a total of twenty-nine 70/100 dollars paid monthly into the said association on account of the said loan that, beginning in March, 1893, your complainant has paid the said sum of twenty-nine 70/100 — monthly to the said association up to and including the month of July, 1903, making a total of one hundred and twenty-five (125) months and the total amount paid three thousand seven hundred twelve 50/100 dollars ($3712.50).

4 8. Your complainant is advised and believes that upon a just and equitable method of computing the payments made on the said loan he is entitled to be credited with his monthly payments of one dollar per share on eleven shares from March 1893, the date of the said loan, to July 1903, the date of the last payment made thereon, a period of one hundred and twenty-five months, amounting to thirteen hundred seventy-five dollars ($1375.00); and he is entitled to credit for the monthly payments of seventy cents per share made on account of the so-called "premium," monthly, for the same period, amounting to nine hundred and sixty-two dollars 50/100 ($962.50); and he is entitled to interest on both of the said payments from their respective dates to July 1st, 1903, amounting to seven hundred thirty 36/100 dollars ($730.00); making a total credit of three thousand sixty-seven 86/100 dollars ($3067.86), an excess of payments over the said loan of twenty-two hundred dollars and legal interest thereon of eight hundred sixty-seven 86/100 dollars ($867.86).

9. Complainant further says that the amount paid by him to the said association greatly exceeds the amount borrowed and the legal interest thereon by the sum of eight hundred sixty-seven 86/100 — ($867.86), and that the said contract and the payments made by him thereunder were and are usurious and illegal; your complainant further says that his only relation with the said association was that of borrower, and that the requirement of "premiums" was and is an illegal device to exact an usurious rate of interest on the said loan; further complainant tenders himself ready and willing to pay whatever further sums may be due, if any, to the said asso-

5 ciation on account of the said loan.

10. On the 29th day of July, 1903, your complainant demanded from the said association the repayment of the money overpaid as aforesaid, a release of the said mortgage and the cancellation of the said bond; but the said association refused and still refuses to repay the said sum or to release the said deed of trust or to cancel

the said bond, and now threatens to sell the said property because of the refusal of your complainant to pay it a further sum claimed by it to be due under the said loan. For this reason, and owing to the complicated nature of the accounts, your complainant is without remedy at law and will be irretrievably injured if the said sale is permitted to take place.

Prayers.

The premises considered, your complainant prays:

1. That writs of subpœna may issue from this honorable court to the defendants named herein commanding them to appear and answer the exigencies of this bill.

2. That the defendants directors, of the said association, for the said association, be required to account with the complainant with respect to the said loan and be decreed to repay to him the amount paid to the said association over and above the principal and legal interest on the said loan.

3. That the said association, through its said directors, be required to cancel the stock of your complainant and to cancel the said bond.

6 4. That the defendants Samuel H. Walker and Michael I. Weller be required to execute a release of the said mortgage,

5. That he be granted such other and further relief as the nature of the case may require.

The defendants to this suit are,—James W. Whelpley, George R. Repetti, Henry K. Simpson, John E. Herrell, Alexander McKenzie, Charles C. Meads, Charles A. Stockett, James E. Hutchinson, William F. Slater, George W. Montgomery, Samuel H. Walker and Michael I. Weller.

E. H. THOMAS,
F. H. STEPHENS,
Sol'rs for Complainant.

DISTRICT OF COLUMBIA, *ss:*

Samuel Ross, being duly sworn, says he has read the bill by him subscribed and knows the contents thereof; that the matters therein stated by him on personal knowledge are true, and those stated upon information and belief he believes to be true.

SAM'L ROSS.

Subscribed and sworn to before me this — day of October, 1903.

——— ———.

7 *Bond.*

Know all men by these presents: That I, Geo. W. Montgomery, of the city of Washington, in the District of Columbia, am held and firmly bound unto John E. Herrell, treasurer of a certain voluntary

association or joint stock company, denominated the Eastern Building and Loan Association, of Washington, D. C., in the full sum of twenty-two hundred dollars, which well and truly to be paid to said treasurer, as aforesaid, or to his successor in office, I bind myself, my heirs, executors and administrators, firmly by these presents.

Sealed with my seal, and dated this (13) thirteenth day of March, A. D. 1893.

Whereas, I the said Geo. W. Montgomery, a stockholder in said association did on the 13th day of March A. D. 1893, in accordance with the constitution thereof purchase and receive from said association an advance on eleven shares of stock therein, amounting to the sum of twenty-two hundred dollars, at a premium of seventy cents monthly per share.

Now, if I, the said Geo. W. Montgomery, my executors or administrators, shall, on or before the first Wednesday of each and every month occurring after the date hereof, and until full settlement of said advance and premium, as provided for in said constitution, pay or cause to be paid, in current funds, to said treasurer or his successor in office, the sum of two (2) dollars and seventy cents on each share of stock held by me on which an advance has been
8 made, together with all fines, and forfeitures imposed under the provisions of said constitution (and do and shall well and faithfully perform each and every condition of each and every bond which may hereafter be given by me on account of any future purchases on stock of said association made by me within ten years from the date thereof, and to the extent of — dollars), then this obligation to be null and void, otherwise to be and remain in full force and virtue in law.

(Signed) GEO. W. MONTGOMERY. [SEAL.]

Signed, sealed and delivered in presence of—
(Signed) GEO. C. JOHNSON.

9 EXHIBIT No. 1.

Filed January 18, 1904.

This indenture made this 13th day of March in the year of our Lord one thousand eight hundred and ninety-three, by and between George W. Montgomery (unmarried) of the District of Columbia of the first part, and Samuel H. Walker and Michael I. Weller, trustees of the Eastern Building and Loan Association of Washington, D. C., of the second part, witnesseth, that whereas the said George W. Montgomery on the 13th day of March, in the year of our Lord one thousand eight hundred and ninety-three, by his certain sealed obligation of that date acknowledged himself to be indebted unto John E. Herrell, treasurer of said association, in the sum of twenty-two hundred dollars current money and delivered the said obligation to the

said treasurer as aforesaid, which said obligation is subject to certain conditions therein set forth ; and in order to secure the prompt payment of the monthy payments and all fines and forfeitures as in said bond recited, the said party of the first part hath agreed to execute these presents: Now therefore this indenture witnesseth, that the said party of the first part for and in consideration of the premises and the sum of five dollars current money to him in hand paid by said parties of the second part at or before the sealing and delivery of these presents the receipt of which is hereby acknowledged, hath given, granted, bargained and sold, aliened, enfeoffed, released, conveyed and confirmed and by these presents doth give, grant, bargain and sell, alien, release, enfeoff, convey and confirm to and unto the said parties of the second part and the survivor of them, his heirs and assigns, all that
10 piece or parcel of ground and premises situated, lying and being in the county of Washington in the District of Columbia and known and distinguished as and being part of lots twenty-three and twenty-four (24) in B. P. Watrous' sub-division of part of block seven of "Trinidad" recorded in County Book 7, page 5, surveyor's office of said District, beginning at a point on east Twelfth street extended twenty-nine feet southof the northeast corner of lot twenty-three (23), thence south along the east line of said lot seventeen (17) feet, thence west at right angles ninety (90) feet, thence north along the west line of said lot seventeen (17) feet, thence east ninety (90) feet to the beginning, being the south eleven (11) feet of lot twenty-three (23) and the north six (6) feet of lot twenty-four (24); together with all the improvements, ways, easements, rights, privileges and appurtenances thereto belonging or in any manner appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however of the said party of the first part of, in, to or out of the said piece or parcel of ground and premises. To have and to hold the said piece or parcel of ground and premises with the appurtenances to and unto the said parties of the second part and the survivor of them, his heirs and assigns, subject nevertheless to the following intents, uses and trusts and none other, that is to say, in trust to suffer and permit the said party of the first part, his heirs and assigns, to have, hold, use, possess and enjoy the said piece or parcel of ground and premises with the appurtenances and the rents issues and profits thereof to receive and enjoy until default be made in the payment of any one or more of said monthly dues or of the fines or forfeitures in said
11 sealed obligation specified as the same shall become due and payable. And upon the full payment of the said indebtedness, including all fines and forfeitures which may accrue thereupon according to the true intent and meaning of said obligation at any time before the sale hereinbefore provided for, to release and re-convey said described premises unto the said George W. Montgomery, his heirs and assigns at his or their cost. And upon the further trust, after such default and when requested in writing by

the treasurer of said association for the time being to sell said piece or parcel of ground and premises at public auction at such time and upon such terms and conditions and after such previous notice as to them or him shall appear most advantageous to the party's interest and to convey the same in fee simple to the purchaser or purchasers thereof, and he shall not be required to see to the application of the purchase money, and from the proceeds of said sale or sales 1st to pay the expenses thereupon and to receive as compensation a commission of five per cent. on the amount of said sale or sales, and secondly, to pay to the treasurer of said association for the time being or to any other person authorized by said association to receive the same the said sum of twenty-two hundred dollars secured by the said sealed obligation, after deducting therefrom any credit on account with said association at the time that said default as aforesaid shall have been made and the balance of the proceeds of sale, if any, to pay over to the said George W. Montgomery, his heirs or assigns.

In testimony whereof the said parties of the first part have
12 hereunto set — hand and seal the day and year first hereinbefore written.

(Signed) GEORGE W. MONTGOMERY. [SEAL.]
(unmarried)

Signed, sealed and delivered in the presence of—

GEORGE C. JOHNSON.

DISTRICT OF COLUMBIA, *To wit:*

I, A. B. Dent, a notary public in and for the District aforesaid do hereby certify that George W. Montgomery, (unmarried) party to a certain deed bearing date on the 13th day of March, A. D. 1893, and hereto annexed, personally appeared before me in the District aforesaid, the said George W. Montgomery being personally well known to me to be the person who executed the said deed and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this 13th day of March, 1893.

(Signed) A. B. DENT,
Notary Public. [NOTARIAL SEAL.]

13 *Answer of Whelpley et al.*

Filed November 14, 1903.

In the Supreme Court of the District of Columbia.

SAMUEL ROSS, Complainant,
vs.
JAMES W. WHELPLEY ET AL., Defendants. } In Equity. No. 24253.

The defendants, Whelpley, Repetti, Simpson, Herrell, McKenzie, Meads, Stockett, Hutchinson, Slater, Walker and Weller, for answer to the plaintiff's petition or bill of complaint say :—

1. That they admit the allegations of the first paragraph of said petition or bill.

2. They admit the allegations of the second paragraph, subject to the qualifications or explanations set forth in a later portion of this answer.

3. They have no knowledge as to the matters and things set forth in the third paragraph and therefore neither admit nor deny the same.

4. They admit the allegations of the fourth paragraph.

5. They deny that the said Eastern Building and Loan Association is or was on the 13th day of March, 1893, engaged in loaning money or that the defendant Montgomery borrowed from it $2200 or any other sum; but they say, that the said transaction in said paragraph referred to was in the nature of and consisted of an advance to said Montgomery as a stockholder or shareholder in
14 said association, the particulars of which are set out in a later part of this answer.

They admit the execution of the bond and deed of trust mentioned in said paragraph, but say that an inspection thereof does not warrant the plaintiff's statement or allegation that it was a loan, but on the contrary the said two papers show very clearly that the said so-called loan was an advance on said Montgomery's stock as hereinbefore stated.

6. They deny that the said Montgomery acted as agent for the plaintiff; and have no knowledge as to whether the plaintiff is the equitable owner of said real estate and can therefore neither admit nor deny the same, and they require strict proof thereof. They admit that a large number, perhaps all, of the payments of dues, interest and premium have been made by the plaintiff, but whether on his own account or as a representative of the said Montgomery they do not know.

7. They admit that the monthly payments of $2.70 on each share of stock have been made from March, 1893, to and including July, 1903, but they deny, as before stated, that the said $2200 was in any

sense a loan, as claimed by the plaintiff, but they reassert that it was an advance on the 11 shares of stock which the plaintiff says that the said Montgomery took.

8. They are advised that the eighth paragraph being merely legal conclusions, they are not required to make answer to the same; but they wish to say that they deny such legal conclusions.

9. They deny the allegations of the ninth paragraph.

15 10. They admit that the plaintiff has made a demand for the cancellation of the deed of trust and for a refund of what he claims as overpayment, and that they have refused to do either, but say that the reasons for said refusal were fully justified in law and equity, and are those hereinbefore and hereinafter set out, and that there still remains an obligation on the part of the said Montgomery to continue his monthly payments until his shares mature; and that their proposed sale is founded on that idea and the failure of the said Montgomery to keep up his said monthly payments since July, 1903.

And for further answer to said petition or bill of complaint these defendants say, that the said Eastern Building and Loan Association was organized on the 30th day of January, 1889, in the District of Columbia, and was in the nature of a joint stock company, under the title "The Eastern Building and Loan Association of Washington, D. C." and that there were then adopted certain by-laws, in force up to the date of the said advance to said Montgomery, and the execution of his said bond and deed of trust, and that the material portions of said by-laws as to said advances were as follows:

Preamble.

The name of this association shall be The Eastern Building and Loan Association of Washington, D. C., and its object to receive from and loan to stockholders its funds subject to the following by-laws.

* * *

SEC. 3. Periodical meetings of this association shall be held on the first Wednesday of each month.

* * *

16 SEC. 17. Each stockholder shall pay to the association $1.00 per share on each share of stock held by such stockholder, every month at the time and place the periodical meetings are held during the continuance of the series to which his shares belong.

* * *

SEC. 18. The stock of the association may be issued in two or more series at the direction of the board of directors in such quantities and at such times as they may think proper, until all the stock is in the hands of the stockholders:

Provided That the limit of a series shall be the number of shares subscribed in six months.

* * *

SEC. 19. When more than $200 is in the treasury not subject to withdrawals the board of directors shall offer the same at public auction and the stockholder or stockholders who shall bid the highest rate per share of premium, payable every month at time of payment of dues on stock, shall be awarded a loan of $200 on each share of stock held by him or her: *Provided*, That no bid of premium less than 60 cents per share shall be entertained.

* * *

SEC. 21. Every stockholder to whom a loan is granted by the association shall pay all expenses of examination of title, etc. * * * and in addition to the periodical payments on stock aforesaid shall pay 6 per cent. per annum interest on the amount of the loan, which interest shall be divided into twelve equal payments per annum, and also the rate of premium on each share per month, at regular periodical meetings, bid for priority of loan. And said pay-
17 ments of interest and premium shall be made at the same time and place the periodical payments on stock are payable, and shall continue during the whole term of the series to which the borrowed stock shall belong.

* * *

* * *

SEC. 26. Borrowing stockholders may repay a loan or any part thereof. not less than one or more full equal shares at any time and shall then receive the withdrawal value of the shares pledged for such loan, and the shares shall revert back to the association. A borrower may, however, pay the full amount of his loan in cash and continue his stock in the association.

SEC. 30. Stockholders withdrawing shall be entitled to receive from the treasury all periodical payments of dues on their shares of stock, not including fines or interest, and after the first twelve months from the commencement of payments on any series of stock, 60 per cent. of the profits on each share as reported at the last preceding semi-annual statement.

* * *

SEC. 33. When each share of stock in a series shall have reached the full value of two hundred dollars * * * a meeting of stockholders shall be called * * * when the work of making a final settlement shall be commenced. Upon such settlement each stockholder shall receive the sum of two hundred dollars for each share of stock held by him or her in money; or in case a loan has been granted, the bond and mortgage fully satisfied of record * * * and then the series shall proceed to dissolve and it shall cease."

18 And these defendants say that from time to time by authority of the board of directors the said association did issue stock each six months, beginning with the months of February and August in each year up to and including the month of February, 1893, when the 9th series was issued and that the said George W. Montgomery became a subscriber to eleven shares of stock in said 9th series and at the periodical meeting on the first Wednesday in March 1893 bid a premium of 70 cents per share for an advance of the amount of said eleven shares, to wit, $2,200 and received the same in full and thereupon executed the said bond and deed of trust to secure the same, and commenced and continued to pay his dues, interest and premium until and including the month of July, 1903, and continued to remain during the whole of said time and until now a stockholder and member of said association with all the rights, privileges and obligations pertaining thereto. That as required by the said by-laws the said association did each month cause to be estimated each six months, to wit, on the 31st days of January and July in each year a statement showing the value of each share in each series, and had the same in printed form ready to be delivered to each stockholder on request.

And that on the 31st day of July, 1903, the value of each share in the said ninth series was $126.00 making for 11 shares $1386, amount paid in for dues, and $484.99 as profits on the 11 shares at the rate of $44.09 per share, of which the said Montgomery was entitled if he wished to pay off his loan and withdraw, to 60 per cent., or $291 of said profits; entitling him to a credit of $1677 on his $2200 indebtedness, or the alternative privilege of continuing his payments

19 for two or three years longer when each of his shares will reach the figure of $200 when he will be entitled to a cancellation of his bond and a release of the deed of trust securing the same.

These defendants say, that while the word loan is used in the by-laws, the transaction hereinbefore referred to was really an advance on the said several shares of stock to the full value thereof, and the said association was organized and the said transaction had on the faith of the long settled law in this District, as determined by the highest courts thereof, that such transaction *were* fully legitimate and authorized by law. That said association consists of, and has always consisted of from time to time, a large and shifting number of stockholders or members. That it has now reached its 26th series and that the first six series and the 8th, 10th, 11th and 12th series have been paid off and settled in full, and all the nonborrowing stockholders in the 7th, 9th and 13th to 19th series inclusive have been paid off in full, and all this while the said Montgomery was a member; and the amount received from him as interest and premium went into and was computed as part of the profits and value of the shares of stock in each of said series. These series were settled by reason of the accumulation of funds for which no bids were made and which the association was therefore unable to loan or advance to stockholders and the said Montgomery and the plaintiff

were well aware of this condition of affairs and of these retirements of stock so made so that they are estopped to claim any refund for any overpayment, whatever may be their rights as to a refusal to make further payment.

20 That the said profits for which the said Montgomery is given credit consist of interest and premiums on other loans or advances similar to his and of which he and the plaintiff have always been well aware and of which they were informed at the time of procuring said loan or advance.

And they are not therefore in equity entitled to any change of the contract entered into, or to settle on any other basis than that contemplated thereby and provided for by the by-laws of said association.

JAMES W. WHELPLEY.
GEO. R. REPETTI.
HENRY K. SIMPSON.
JOHN E. HERRELL.
ALEXANDER McKENZIE.
CHARLES A. STOCKETT.
JAS. E. HUTCHINSON.
CHARLES C. MEADS.
WILLIAM F. SLATER.
SAMUEL H. WALKER.
MICHAEL I. WELLER.

HALLAM & HALLAM,
Solicitors for Defendants.

DISTRICT OF COLUMBIA, *To wit:*

I, Henry K. Simpson, do solemnly swear that I am the secretary of the Eastern Building and Loan Association, and that I have read the foregoing answer by me subscribed and know the contents thereof, and that the facts therein stated of my personal knowledge are true, and those facts therein stated upon information and belief I believe to be true.

HENRY K. SIMPSON,
Secretary E. B. & L. Assoc'n.

21 Subscribed and sworn to before me this 5th day of November, 1903.

[SEAL.] MARTIN L. WHELPLEY,
Notary Public, D. C.

Answer of Geo. W. Montgomery.

Filed December 11, 1903.

In the Supreme Court of the District of Columbia.

SAMUEL ROSS
vs.
J. W. WHELPLEY ET AL. } Equity. No. 24253.

The answer of George W. Montgomery to the bill of complaint filed herein respectfully shows as follows:

1. 4. He admits the allegations of paragraphs one to four inclusive.

5. He admits that he borrowed the twenty-two hundred dollars from the Eastern Building and Loan Association, as alleged in paragraph 5, and gave as security therefor a deed of trust upon the said property and executed the bond as set forth in said paragraph.

6. He admits that he had no beneficial interest in the said property, but acted in obtaining the said loan and in executing the said bond and mortgage as the agent for the complainant; and he admits that the complainant has paid all the dues to the said association required under the said loan.

22 7. This defendant admits the allegations of paragraph 7, with the exception that he has no knowledge of the total amount paid to the said association.

8 and 9. This defendant has no knowledge of the matters set forth in paragraphs 8 and 9.

10. Answering paragraph 10 this defendant says he has no knowledge of the demand made by the complainant for the release of the said mortgage and bond for repayment. He further says that his relation to the said association was merely that of borrower; that he never owned any stock in the said association other than the eleven shares he was compelled to take in execution of the loan as set forth in the said bill; that he had no other stock in the said association and had no other connection therewith.

GEORGE W. MONTGOMERY.

E. H. THOMAS,
F. H. STEPHENS, *Sol'rs.*

DISTRICT OF COLUMBIA:

George W. Montgomery, being duly sworn says he has read the answer by him subscribed and knows the contents thereof; that the matters stated upon his personal knowledge are true and those stated upon information and belief he believes to be true.

Subscribed and sworn to before me this 9th day of December, 1903.

ULRIC T. MENGERT,
Notary Public.

[SEAL.]

23 *Stipulation.*

Filed March 21, 1904.

In the Supreme Court of the District of Columbia.

SAMUEL ROSS
vs.
JAMES W. WHELPLEY ET AL. } Equity. No. 24253.

It is hereby agreed by the parties to this cause, through their counsel of record, that the following facts shall be taken as proven in the cause, and that the cause shall be heard upon the bill and the answers thereto and this stipulation so far as it modifies the pleadings, and no further, reserving to the parties, however, the right to raise any question of law at the hearing thereof:—

That the complainant purchased the property set out in the original bill, putting the title in the name of the defendant Montgomery, and had numerous conferences with the officers of the defendant association in relation to the property and the loan thereon both before and after the making of the said loan; that he arranged with the officers of the said association for the insurance on the said property and made the monthly payments to the association by the checks of Barber & Ross, the name under which the complainant does business; the said loan was carried in the name of Montgomery and was called "the Montgomery loan" by both parties, and the correspondence was conducted in the name of Montgomery except that the checks were enclosed in letters written by Barber & Ross and except as modified by the letters attached hereto; that Montgomery never actually took any part in regard to the said loan other than the signing of the said trust and bond;

24 that the first notice that the association had, other than the facts contained herein, that the complainant claimed to own the property was on July 29, 1903. That the complainant, as above stated, obtained from the said association the sum of twenty-two hundred dollars ($2200.00) to be used in paying part of the purchase money for the said property, and in order to obtain the said amount, as the said association could only loan or advance money to stockholders, a certificate for eleven shares of stock in the ninth series therein was issued in the name of Montgomery and there was bid for the said advance a premium of seventy cents per share, to wit, the sum of seven 70/100 dollars ($7.70) on the eleven shares, to be repaid in that amount each month, all of which was known to the plaintiff; that on the 13th day of March, 1893, the said Mont-

gomery, still acting as agent for the complainant, but holding title in his own name, in order to secure the repayment of the said twenty-two hundred dollars, executed to the said association, a mortgage, by way of deed of trust, on the said property, and a bond to the said association,—a copy of each of said instruments is filed as an exhibit to the bill and is to be read as a part hereof; that from and including the month of March, 1893, down to and including the month of July, 1903, the complainant himself paid to the said association on account of said twenty-two hundred dollars, each month the sum of eleven dollars on account of principal of said amount, eleven dollars on account of interest thereon and seven 70/100 dollars on account of the premium aforesaid making a total of twenty-nine 70/100 dollars ($29.70) paid by the said complainant monthly to the said association for a period of one hundred and twenty-five (125) months, the total amount thus paid being three thousand seven hundred twelve 50/100 dollars ($3712.50), the said payments being made by the checks of Barber & Ross as aforesaid, and the said Montgomery was known to be an employee of the said Ross in his mercantile business (firm).

25

Neither the complainant nor said Montgomery has any connection with the said association, or holds any stock therein, other than the transaction above set forth.

The by-laws of the said association, a copy of which is attached hereto, shall be considered a part of this stipulation; also the semi-annual statement of the association of July 31, 1903, also that during each six months since the said loan similar statements were issued showing the value of the ninth series of stock at their respective dates and that the said statements state the value of the respective series, according to the by-laws, the effect of said by-laws and statements being questions of law for the court; but it is not admitted that either complainant or Montgomery ever received any of these statements except that complainant admits having had a copy of the statement of July 31, 1901, which shows the value at that time of each share in the ninth series was $129.33.

There also shall be considered as a part of this stipulation two letters of March 16, and May 28, 1903, and one of March 17, 1894, and one of October 4, 1893, attached hereto.

None of the statements of amounts due, or calculations made in reference to the said loan, contained either in the bill or answer filed herein, shall be taken as true as against any of the parties hereto, but the court shall decide as to the correctness thereof, to be governed by the pleadings and this stipulation.

26

E. H. THOMAS,
F. H. STEPHENS,
Sol'rs for Complainant.
HALLAM & HALLAM,
Sol'rs for Defendants Representing the Bldg. Ass'n.

27 EXHIBITS TO STIPULATION.

Filed March 21, 1904.

By-Laws of the Eastern Building and Loan Association of Washington, D. C. Organized January 30, 1889.

Shares, $1 per month. $200 loan on each share.

Periodical meetings for payment of dues on the first Wednesday evening of each month, at Herrell's hall, No. 650 Penn. Ave. S. E., Washington, D. C.

Eastern Building and Loan Association. Organized Jan. 30, 1889.

Shares, $1 per month. $200 loan per share.

Meetings for payment of dues, first Wednesday evening of each month, at Herrell's hall, 650 Pa. Ave. S. E.

Officers.

President:

J. W. Whelpley, 800 E. Capitol St.

Vice-President:

Geo. R. Repetti, 400 Pa. Ave. S. E.

Secretary:

Henry K. Simpson, 326 Pa. Ave. S. E.

Treasurer:

John E. Herrell, 926 Pa. Ave. S. E.

Attorney:

Orrin B. Hallam, 458 La. Ave. N. W.

Directors:

J. W. Whelpley, 800 E. Capitol St.
Geo. R. Repetti, 400 Pa. Ave. S. E.
Henry K. Simpson, 326 Pa. Ave. S. E.
John E. Herrell, 926 Pa. Ave. S. E.
Alex. McKenzie, 1004 E. Capitol St.
C. C. Meads, 101 4th St. N. E.
Chas. A. Stockett, 500 B St. S. E.
Jas. E. Hutchinson, 904 Pa. Ave. S. E.
Wm. F. Slater, 434 N. J. Ave. S. E.

The Eastern Building and Loan Association.

Name and Object.

The name of this association shall be The Eastern Building and Loan Association of Washington, D. C., and its object, to receive from and to loan to stockholders its funds, subject to the following by-laws:

Stockholders.

Section 1. The stockholders shall be persons of full age. Minors may hold stock by their parents or guardians. Married women of full age may hold stock, and shall have all the rights and privileges of other members, including the right to borrow money from the association and bid premiums therefor, and shall also have the right and power to secure such loan by transferring their said stock or other securities to the association, or by executing bond or mortgage upon their separate real estate to secure said loan: *Provided, however,* That the husband of any such married woman join in the execution of such bond and mortgage; and married women shall have the right to sell, assign and transfer their said stock, or withdraw the same, without joining their husbands in such transfer or withdrawal, and such stock shall not be liable for the debts of the husband.

Meetings.

Stockholders' Regular Annual Meeting.

Sec. 2. A regular meeting of the stockholders shall be held at the regular meeting place of the association annually, as follows: on the first regular meeting in February of each year, at 7.30 o'clock p. m., at which meeting reports shall be made of the business done by the association during the preceding year, the condition of its finances, and the amount of profits earned. An election shall be held for nine directors to serve for the year following, notice of which meeting shall be given in such manner as the board of directors may determine.

Periodical Meetings of the Association.

Sec. 3. Periodical meetings of this association shall be held on the first Wednesday of each month, at Herrell's hall, 650 Pennsylvania avenue S. E., or such other place as may be designated by the board of directors, between the hours of 7 and 8.30 o'clock p. m., for the purpose of receiving payments on stock by stockholders, and of interest on loans, fines and charges; also for assessing fines on arrearages, receiving applications for and awarding loans, and for attending to such matters of a business character as pertain to the welfare of the association.

MEETINGS OF THE BOARD OF DIRECTORS.

Regular Meetings.

SEC. 4. Regular meetings of the board of directors shall be held at the regular meeting place of this association on the first Wednesday of each month at 7.30 o'clock p. m.

Special Meetings.

SEC. 5. Special meetings of the board of directors may be called and held whenever the president or board may deem such action necessary.

Officers.

SEC. 6. The officers of this association shall consist of a board of nine directors, who shall hold office for the period of one year from the date of their election (and until their successors be elected), and a president, vice-president, secretary, treasurer, and an attorney, who shall be elected as hereinafter specified.

Board of Directors.

SEC. 7. The board of directors shall have the management of the business affairs of the association. The board shall attend to the business connected with applications made for loans, examine the property offered for mortgage, see that the title thereto is good, the deed of trust to the association a first deed of trust, and that the proper papers are prepared, executed, delivered and recorded. At all times the funds of the association shall, as far as possible, be kept profitably employed, and in such manner as to best accommodate stockholders and carry out the objects of the association. The board shall attend to the repayment of loans, and, where default is made, proceed by due process of law on the mortgage securities and lien, and, if it become necessary, buy the property at any sale thereof, in order to secure the loan, and, as soon thereafter as a sufficient price can be had for such property, sell the same. The board shall also frequently examine the books of the officers of the association, and see that the officers attend to their duties faithfully. The board shall organize at the next periodical meeting after its election, and elect from their own number a president and vice-president, and also from stockholders, whether members of the board or not, a treasurer, secretary, also an attorney, whether he be a stockholder or not, and also two trustees who are not stockholders and in whom shall be vested the title to all the property of the association. The board of directors shall also have the power to fill, by appointment, any vacancies that may occur in any elective office between elections.

Five directors shall constitute a quorum for the transaction of business. If any director shall absent himself from the board for three consecutive meetings without furnishing satisfactory excuse, his place may be declared vacated and a new member elected.

President.

SEC. 8. The president shall preside at all meetings of the stockholders and of the directors. He shall appoint at each periodical meeting two cashiers, and perform all duties generally pertaining to such office.

Vice-President.

SEC. 9. The vice-president shall attend to the duties of the president in his absence.

Secretary.

SEC. 10. The secretary shall keep a faithful record of the proceedings of the board of directors and of the stockholders' meetings; he shall keep a faithful account with each stockholder and a general account with the association of the amount of money received, and of all disbursements; he shall furnish a financial exhibit of the association every six months, or oftener, if required; he shall keep all books and papers properly belonging to his office; he shall report at each stated meeting the names of all delinquent stockholders and borrowers, and he shall perform such other duties as the by-laws of the association may direct; and for his services rendered he shall receive a compensation to be fixed by the board; he shall be the custodian of all bonds and mortgages, deeds, policies of insurance and securities whatsoever belonging to the association, excepting his own bond and mortgage, in case he becomes a borrower, of which the president shall be the custodian; he shall furnish a statement every six months of the amount of money received and disbursed, and the amount of loans made, and shall turn over to the auditing committee all deeds, bonds and mortgages, fire insurance policies and securities in his possession for their inspection; he shall give the board of directors at least one month's notice of the date of the expiration of the policies of fire insurance in his possession, and for the faithful performance of his duties shall give bond in such amount as the board of directors may determine, with sureties to be approved by them, which bond shall be held by the president.

Treasurer.

SEC. 11. The treasurer shall receive and receipt for all moneys paid over to him by the cashiers, and shall deposit the same in the name of the association within twenty-four hours in such bank as the board of directors may designate. He shall keep an account of

all moneys received and paid out in a book provided for that purpose, which shall at all times be subject to the inspection of the board of directors. For the faithful performance of his duties, and to secure the association against loss of funds in his hands, he shall give bond in such sum as may be deemed necessary, from time to time, by the board of directors, with two (2) sureties, who shall be approved by the board, and for his services and responsibilities he shall receive a compensation to be fixed by the board.

Cashiers.

SEC. 12. The duties of the cashiers shall be to receive all moneys paid in at each stated meeting and pay the same over to the treasurer, taking his receipt therefor, and deposit the said receipt with the secretary.

Attorney.

SEC. 13. The attorney shall examine the records of all the titles, title papers, and make or procure the necessary searches for liens against any and all property offered as security for money loaned, and certify the same in writing; prepare all deeds, bonds, mortgages, agreements and other writings of a legal nature, to be given or taken by the association; institute and prosecute all legal proceedings, and transact all other legal business on behalf of the association, and shall be entitled to receive the sum of twenty dollars for his fees from the borrowing stockholder for each examination of title and preparing of papers, and for such other professional services as may be rendered such compensation as the board of directors may fix.

Officers to Return Books and Papers.

SEC. 14. At the expiration of the term of any and all officers, all books, papers and property in their possession relating to the business of the association shall be forthwith delivered to his or their successor in office.

Elections.

SEC. 15. All elections shall be by ballot; each stockholder not in arrears shall be entitled to one vote.

PAYMENTS BY STOCKHOLDERS.

Periodical Payments on Stock.

SEC. 17. Each stockholder shall pay to the association $1 per share on each share of stock held by such stockholder every month, at the time and place the periodical meetings are held, during the con-

tinuance of the series to which his shares belong: *Provided, however,* That any stockholder may pay dues on his stock in advance of the time when the payments become due, and in case payments are made six months or more in advance, the stockholders so paying shall receive interest on such advance payments at the rate of 6 per cent. per annum (or such other rates as the board of directors shall from time to time establish by resolution) on amount so paid in advance for the length of time the association has the use of the money in advance of the time it becomes due, said interest to be computed and paid at the end of each six months, dating from the time of payment. But should the stock so paid in advance be withdrawn before the expiration of any period of six months from time of payment or former settlement of interest no interest shall be allowed.

Issue of Stock.

SEC. 18. The stock of the association may be issued in two or more series at the direction of the board of directors, in such quantities and at such times as they may think proper, until all the stock is in the hands of the stockholders: *Provided,* That the limit of a series shall be the number of shares subscribed in six months. New stock may be issued from time to time in lieu of shares withdrawn or forfeited. Persons becoming stockholders subsequent to the organization shall pay all installments due on the series to which their stock shall belong, together with the profit earned on such stock, up to the date of the last statement, and, except in case of obtaining a loan, shall have the privilege of paying double installments until all such arrearages are fully paid.

Loans.

SEC. 19. When more than $200 is in the treasury not subject to withdrawal, the board of directors shall offer the same at public auction, and the stockholder or stockholders who shall bid the highest rate per share of premium, payable every month at time of payment of dues on stock, shall be awarded a loan of $200 on each share of stock held by him or her: *Provided,* That no bid of premium less than 30 cents per share shall be entertained. Such bids, however, shall be made in amounts that are divisible by five. Loans may be made on a fractional part of a share: *Provided,* That a loan shall not be made on less than one-half a share. If all the money is not taken by the first borrower to whom a loan is awarded, the remainder may be sold in the same way, or it may be advanced to any member of the association under the non-participating stock plan, viz.: Members receiving advances under this plan shall pay one dollar per month interest for every share on which an advance is made, in addition to the monthly dues of one dollar per month per share.

SEC. 20. When advances cannot be made for a premium of 30 cents, or loaned under the non-participating stock plan, the board

of directors shall be authorized to redeem stock in the oldest series as follows: To the value of a share, as given in the last annual report, will be added, first, the amount of regular monthly payments on the share since the date of said report; second, the amount of interest, at the same rate per cent. per annum as allowed on withdrawals, that has accrued since the date of said report upon the total payments on such share, the aggregate of which amounts shall be announced as the actual value of such share. Bids shall then be received for the voluntary surrender of stock, at this or a lower price, sufficient to absorb the funds on hand.

SEC. 21. Every stockholder to whom a loan is granted by the association shall pay all expenses of examination of title, preparation and recording of papers and search for liens, all premiums for insurance and renewal of same, all fees for appraisement of property offered as security, and, in addition to the periodical payments on stock aforesaid, shall pay 6 per cent. per annum interest on the amount of the loan, which interest shall be divided into twelve equal payments per annum, and also the rate of premium on each share per month, or regular periodical meetings, bid for priority of loan. And said payments of interest and premium shall be made at the same time and place the periodical payments on stock are payable, and shall continue during the whole term of the series to which the borrower's stock shall belong. Each borrower shall receive the full amount of his loan in cash, less the charges and expenses attending the same, and all arrearages on his stock, if any. If any stockholder shall fail to make the payments on loans, interest and the premiums thereon for two months, the board of directors may compel payment by ordering proceedings for that purpose on the securities according to law.

Fines.

SEC. 22. Fines for non-payment, when due, of periodical payments on stock, interest, premiums for priority of loan, and premiums of insurance, shall be one (1) per cent. per month on the amount of such arrearages.

Fines for Declining Loans.

SEC. 23. Any stockholder to whom a loan has been granted, by declining to receive the same, or failing to give security therefor to the satisfaction of the board of directors for one month after the amount of such loan shall have accumulated in the treasury, shall forfeit his right to such loan, shall pay a penalty of 1 per cent. per month on the loan until the money has been resold and all expenses refunded, and shall be charged the regular dues, premium and interest.

Transferring Loans.

SEC. 24. Any stockholder successful in obtaining the right to a loan, and not being able to furnish satisfactory security for the same within thirty (30) days, may transfer his stock upon which he made the application to another, subject to the payment of a transfer fee, and provided the interest on the money placed to his credit shall have been paid up to the time of transfer, and all other expenses pertaining to the loan.

Security for Loans.

SEC. 25. All loans shall be secured by bond and first deed of trust upon real estate situated in the District of Columbia, and a policy of fire insurance upon the buildings thereon erected, and an assignment of the shares of stock upon which the loan is obtained, to the association as collateral, to secure the repayment of the loan, to be approved by the board of directors: *Provided*, That the security received for a loan shall in no case be of a less cash value than the full amount of the shares upon which such a loan is granted, and shall have been examined and approved by the committee of the board of directors appointed by the president, and the proper examination made as to the title of and liens against such security. Also that the loan shall in no case exceed eighty (80) per cent. of the appraised value of the property on which the loan is made, except when paid up stock to the full amount of the loan is given as collateral.

Repayment of Loans.

SEC. 26. Borrowing stockholders may repay a loan, or any part thereof, not less than one or more full equal shares at any time, and shall then receive the withdrawal value of the shares pledged for such loan, and the shares shall revert back to the association. A borrower may, however, pay the full amount of his loan in cash, and continue his stock in the association.

Satisfaction of Deeds of Trust.

SEC. 27. All deeds of trust shall, on payment thereof, be satisfied of record by the president, or other officer delegated, upon resolution — the board of directors, upon payment by the borrower of the customary fee to the recorder of deeds of the District of Columbia, and the usual fee to the trustees.

Transfer of Stock.

SEC. 28. The fees for transferring stock shall be twenty-five (25) cents per share, to be paid by the person to whom the stock is transferred, unless otherwise agreed by the parties to the transfer. Shares

may be transferred in person or by attorney-in-fact. No transfer shall be made if the periodical payment or any charges due thereon are unpaid.

Forfeiting Stock.

SEC. 29. The amount of unpaid installments of stock and other charges incurred thereon under the provisions of the by-laws shall be a lien on each share of stock on which the same has become due and remains unpaid, and, if not paid into the treasury within six months, such stock shall, after paying the charges, be cancelled, and the balance, if any, returned to the defaulting stockholder.

Withdrawals.

SEC. 30. Stockholders withdrawing shall be entitled to receive from the treasury all periodical payments of dues on their shares of stock, not including fines or interest, and after the first twelve months from the commencement of payments on any series of stock, 60 per cent. of the profits on each share as reported at the last preceding semi-annual statement. One month's notice of such withdrawal must be presented in writing. Stockholders withdrawing before twelve months' membership and payment of dues will be charged a proportionate sum on each share for expenses of conducting the association. The money shall be paid on withdrawals in the order of their presentation, and only one-half of the amount of the funds in the treasury shall be applicable to such purpose. The secretary shall endorse on all withdrawal notices the day and hour of their presentation.

Death of Stockholders.

SEC. 31. Upon the death of any stockholder his or her heirs or legal representatives may continue the stock of the decedent in the association by paying any installments, fines or charges due the association, and the fee prescribed by the by-laws, transferring the stock to them, and they shall subscribe to the by-laws, and hold the stock subject to the same regulations as other stockholders. And should such heirs or legal representatives desire to withdraw the stock of the decedents, they can do so, subject to the same requirements as in the case of other withdrawing stockholders; and, if no loan has been granted on said stock, said heirs or legal representatives shall be entitled to receive the amount of all installments decedent has paid on said stock, and legal interest thereon, less initiation fee, any fines that may be due, and proportionate share of any losses that may have been sustained. No fines shall be charged to deceased member's account from or after his or her decease, unless the legal representative of such decedent assume the future payment on such stock.

Statement of Receipts and Expenditures of Eastern Building and Loan Association,

Six Months Ending July 31, 1903.

1903.	Receipts.	
Jan. 31.	To amount on hand	$2,612.33
July 31.	" " received from Dues .	29,900.88
"	" " " " Loans repaid	5,387.46
"	" " " " Interest .	3,656.05
"	" " " " Premiums	489.64
"	" " " " Sale of Real Estate .	1,018.50
"	" " " " Repayment of taxes adv'cd	161.44
		$43,226 30
1903 July 31.	To Balance	$2,972.04

1903.	Expenditures.	
July 31.	By amount paid out on Loans .	$12,587.46
"	" " " " " " Withdrawals	5,608.54
"	" " " " " Redempt. Stock 13th Series	2,211.28
"	" " " " " Redempt. Stock 19th Series	362.55
"	" " " " " Redempt. Stock 20th Series	17,815.40
"	" " " " " Salaries . . .	482.50
"	" " " " " Comp. of Directors	80.00
"	" " " " " Taxes	539.63
"	" " " " " Office Expenses .	66.90
"	" " Advanced for Taxes on which the Company has loans	500.00
"	Cash on hand	2,972.04
		$43,226.30

Statement of Assets and Liabilities Eastern Building and Loan Association.

1903.	Assets.	
July 31.	To Loans on Real Estate and Stock.....	$125,917.09
	To Real Estate owned by Association...	9,580.00
	To Amount due from members on account dues, etc.....	4,261.07
	To Amount advanced for Taxes on which the Association has loans.....	446.38
	To Cash on hand.....	2,972.04
		$143,176.58

1903.	Liabilities.						
July 31.	By Amount of Advance Payments.....						$570.63
	By Interest on " "						10.68
By Stock:							
7th Series	8	Shares	@	$138	$1,104		
9th Series	11	Shares	"	126	1,386		
13th Series	9½	Shares	"	102	969		
14th Series	14	Shares	"	96	1,344		
15th Series	2	Shares	"	90	180		
16th Series	11	Shares	"	84	924		
17th Series	12½	Shares	"	78	975		
18th Series	8½	Shares	"	72	612		
19th Series	7½	Shares	"	66	495		
20th Series	355½	Shares	"	60	21,330		
21st Series	351½	Shares	"	54	18,981		
22d Series	386½	Shares	"	48	18,552		
23d Series	544	Shares	"	42	22,848		
24th Series	549	Shares	"	30	16,470		
25th Series	788	Shares	"	18	14,184		
26th Series	1,227	Shares	"	6	7,362		127,716.00
		By Net Profit.					14,879.27
							$143,176.58

Present Value of Series.

Seventh	Series	$426.26	+	8	=	$53.28	+	$138	=	$191.28
Ninth	"	484.91	"	11	"	44.09	"	126	"	170.09
Thirteenth	"	274.77	"	9½	"	28.93	"	102	"	130.93
Fourteenth	"	361.88	"	14	"	25.84	"	96	"	121.84
Fifteenth	"	43.58	"	2	"	21.79	"	90	"	111.79
Sixteenth	"	235.64	"	11	"	21.43	"	84	"	105.43
Seventeenth	"	196.80	"	12½	"	15.74	"	78	"	93.74
Eighteenth	"	114.03	"	8½	"	13.42	"	72	"	85.42
Nineteenth	"	84.55	"	7½	"	11.27	"	66	"	77.27
Twentieth	"	3,202.43	"	355½	"	9.04	"	60	"	69.04
Twenty-first	"	2,900.09	"	351½	"	8.25	"	54	"	62.25
Twenty-second	"	2,204.08	"	386½	"	5.70	"	48	"	53.70
Twenty-third	"	2,401.14	"	544	"	4.42	"	42	"	46.42
Twenty-fourth	"	1,178.10	"	549	"	2.15	"	30	"	32.15
Twenty-fifth	"	646.60	"	788	"	.83	"	18	"	18.83
Twenty-sixth	"	124.31	"	1,227	"	.10	"	6	"	6.10

Present Value of Series.

Real Estate.

SEC. 32. This association shall not purchase or acquire any real estate, except such as it may hold mortgages on, and it be necessary to buy in the same to prevent loss.

Dissolution.

SEC. 33. When each share of stock in a series shall have reached the full value of two hundred dollars, or whenever loans to the full amount of every share of stock shall have been made, a meeting of the stockholders shall be called, of which and the object thereof the stockholders shall have had one month's previous notice, in such manner as the board of directors may direct, when the work of making a final settlement shall be commenced. Upon such settlement each stockholder shall receive the sum of two hundred dollars for each share of stock held by him or her in money; or, in case a loan has been granted, the bond and mortgage fully satisfied of record, policy of fire insurance, or whatever may have been given to secure such loan; and then the series shall proceed to dissolve, and it shall cease.

Warrants.

SEC. 34. No money of the association shall be paid out of the treasury except on check signed by the president, treasurer and secretary. No check to be drawn except by order of the board of directors.

Auditors.

SEC. 35. At the last stated meeting of the board of directors in each official term, the president shall appoint three stockholders, not members of the board of directors, to audit the books and accounts of the secretary and treasurer, and to report the result of their examination at the next annual meeting of the stockholders, in writing.

Amendments.

SEC. 36. These by-laws may be amended by a vote of two-thirds of the stockholders present at any regular meeting or any special meeting called for that purpose.

(Here follows statement of receipts and expenditures, marked p. 28.)

29 Barber & Ross, dealers in builders' supplies, 11th and G. streets N. W.

WASHINGTON, D. C., *Oct.* 4, 1893.

H. K. Simpson, sec'y:

Enclosed please find our check on the Columbian national bank for fifty nine & 40/100 dollars, in payment of 2 mos'. dues &c., on lots 22 & 24 bl'k 7, Trinidad.

Please acknowledge receipt of same, and oblige,

Yours truly, BARBER & ROSS,
Per DENT.

(Across body of same)

O. K. rec'd.
H. K. SIMPSON, *Sec'y.*

30 The People's Fire Insurance Company of the District of Columbia; office, No. 302 Pennsylvania avenue southeast.

WASHINGTON, D. C., *Mar.* 17, 1894.

Messrs. Barber & Ross.

GENTLEMEN: I am in receipt of yours of 16th. inst. enclosing c'k for $29.70 in payment of M'ch dues—loan G. W. Montgomery, E. B. and L. Ass'n for which credit has been made. It will require the cash payment of 185.46 and the cancellation of 1 share of stock value 14.54 to cut the loan to $2000 on which the subsequent monthly payments will be $27.

The insurance has been renewed by me as I am required to do by the trustees and we cannot permit any change in the company as the trustees place all insurances on which our association have loans with this company and require me to attend to the renewals.

Hope you will see that the premium is sent to me at your earliest convenience.

Yours truly, H. K. SIMPSON, *Sec'y.*
B. A.

31 Barber & Ross, cor. 11th & G Sts. N. W., mantel and tile department.

WASHINGTON, D. C., *Mar.* 16, '03.

Eastern Building & Loan Association.

GENTLEMEN: Will you please make me a statement of the loan on premises, block # 7, Trinidad. From reading one of your printed circulars, it appears I am the only member of my series.

It seems to me from the amount I have paid in, the indebtedness should be fully paid before this.

Yours very truly, GEORGE W. MONTGOMERY,
Per R.

32 Barber & Ross, cor. 11th & G streets N. W., mantel and tile department.

WASHINGTON, D. C., *May* 28, '03.

H. K. Simpson, Esq., sec. Eastern Loan & Building Association.

DEAR SIR: Will you please give me an itemized statement of my loan on the house on 12th street N. E., and also a copy of the bond and by-laws of your association.

Yours very truly, GEORGE W. MONTGOMERY,
Per R.

Answered—June 5 / 03.
Statement sent and other papers can be seen at office.

33 *Decree.*

Filed June 24, 1904.

In the Supreme Court of the District of Columbia.

SAMUEL ROSS
vs.
JAMES W. WHELPLEY ET AL. } Equity. No. 24253.

This cause coming on to be heard on the bill filed herein, the answers thereto, the agreed statement of facts and the exhibits, and having been argued by counsel and considered by the court,

It is this 24th. day of June, 1904, ordered, adjudged and decreed that the complainant, Samuel Ross, recover against the defendants James W. Whelpley, George R. Repetti, Henry K. Simpson, John E. Herrell, Alexander McKenzie, Charles C. Meads, Charles R. Stockett, James Hutchinson and William F. Slater, the sum of eight hundred sixty-seven 86 / 100 dollars ($867.86) with interest thereon from the 21st day of October, 1903, besides the costs herein to be taxed by the clerk, and that the said complainant have execution therefor as at law.

It is further ordered, adjudged and decreed that the said officers and directors of the said Eastern Building and Loan Association cancel any stock issued to the said complainant or to the defendant George W. Montgomery on account of the loan set forth in the said bill, and cancel the bond given by the said Montgomery and surrender the same to the complainant.

34 It is further ordered, adjudged and decreed that Samuel H. Walker and Michael I. Weller, trustees, defendants herein, execute to the complainant a release of the deed of trust made by the said George W. Montgomery on the real estate set forth in the said bill of complaint.

It is further adjudged, ordered and decreed that in the event of the failure or refusal of the said directors of the said association to cancel or surrender the said bond, so ordered to be cancelled and surrendered as aforesaid, or in the event of the failure or refusal of the said Walker and Weller, trustees, to execute the said release as directed, then the complainant may record this decree among the land records of the District of Columbia to have the same force and effect as if the said cancellation and surrender of the said bond or the release of the said deed of trust had been made as directed herein; and he may apply to the court for further proceedings as he may be advised; and this cause is retained for the purpose of requiring the cancellation of the said bond and the release of the said deed of trust on the said real estate mentioned in this proceeding given to secure the said association.

THOS. H. ANDERSON, *Justice.*

35 *Appeal, &c.*

Filed June 29, 1904.

In the Supreme Court of the District of Columbia.

SAMUEL ROSS, Plaintiff,
vs.
JAMES W. WHELPLEY ET AL., Defendants. } In Equity. No. 24253.

And now come all the defendants, except George W. Montgomery, and appeal in open court from the decree of the court against them, and it is ordered that the appeal bond, to operate as a supersedeas, be fixed at twelve hundred ($1200) dollars.

THOS. H. ANDERSON, *Justice.*

Memorandum.

July 12, 1904.—Appeal bond filed.

36 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 35, inclusive, to be a true and correct transcript of the record, as per rule 5 of the Court of Appeals of the District of Columbia, in cause No. 24,253, in equity, wherein Samuel Ross is complainant, and James W. Whelpley *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 6th day of August, A. D. 1904.

JOHN R. YOUNG, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1461. James W. Whelpley *et al.*, appellants, *vs.* Samuel Ross. Court of Appeals, District of Columbia. Filed Aug. 25, 1904. Henry W. Hodges, clerk.

IN THE

Court of Appeals of the District of Co

JANUARY TERM 1905.

No. 1461.

JAMES W. WHELPLEY, ET AL., *Appella*

vs.

SAMUEL ROSS, *Appellee.*

BRIEF FOR APPELLANTS.

O. B. Hal
W. M. Hal
Attorneys for App

IN THE

Court of Appeals of the District of Columbia

JANUARY TERM 1905.

No. 1461.

JAMES W. WHELPLEY, ET AL., *Appellants*,

vs.

SAMUEL ROSS, *Appellee.*

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

On October 21, 1903, the appellee filed in the Supreme Court of the District of Columbia his bill in equity against the appellants and one George W. Montgomery, setting forth that the appellants, except two of them, Walker and Weller, were the "directors of a certain joint stock company or voluntary association," styled the Eastern Building and Loan Association.

That the association, as part of its business, was engaged in loaning money on real estate security; and that on March 13, 1893, said Montgomery borrowed from it $2,200, and to secure payment executed to said Walker and Weller a deed of trust on certain real estate, also a bond in the

penalty of $2,200; filing as exhibits copies of said bond and deed of trust.

That Montgomery acted as agent for appellee, alleged to be the equitable owner, and that appellee had paid all dues, etc.; that the loan was made at a "premium" of seventy cents per share, and appellee was required to take eleven shares of stock in the associotion and to pay principal, interest and premium thereon until each share should reach $200 in value; that he had paid monthly from March, 1893, till July 1, 1903, $29.70, making a total of $3,712.50.

The eighth paragraph of the bill, which is the gravamen of the action, alleges that appellee is advised and believes that he is entitled on a just and equitable computation to credit of $1 per share, making $1,375, and seventy cents per share premium, making $962.50, and interest on those payments from their respective dates to July 1, 1903, amounting to $730, making a grand total of $3,067.86, as he states it, and leaving a balance due him of $867.86, as overpayment. And in the next paragraph he claims that the contract and payments made by him were usurious and illegal; that his only relation was borrower; and specifically that the requirement of "premiums" was an illegal device to exact usurious interest.

That on July 29, 1903, he demanded from the association the repayment of the money overpaid, a cancellation of the bond and a release of the trust, which was refused; and a sale of the property was threatened.

He prayed that the directors, for the association, be required to account with him and decreed to repay him the amount paid over and above legal interest, for a cancellation of the stock and bond and release of the trust.

The answer of the appellants, filed Nov. 14, 1903, denied that the association was engaged in loaning money or that Montgomery borrowed any; claiming that the transaction was an advance to him of the par value of his stock. It denied also Montgomery's agency or appellee's ownership; and, while admitting that appellee had paid a large part, if not all, of the dues, etc., asserted that they did not know whether it was on his own account or as Montgomery's representative.

It denied also that the contract was usurious, and claimed

that Montgomery was bound to keep up his payments until the stock matured; it then alleged, that the association was organized January 30, 1889, in the nature of a joint stock company, under the title "The Eastern Building and Loan Association of Washington, D. C.," and adopted by-laws in force at the date of the bond and deed of trust—the ones material to the present controversy being the preamble, stating the above name, and its object as being to receive from and loan its stockholders its funds subject to the by-laws. By-law three provided for periodical meetings the first Wednesday in each month. By-law seventeen requiring each stockholder to pay $1 per month per share during the continuance of the series to which the shares belonged. By-law eighteen providing that stock might be issued in two or more series; with a proviso that a series should be limited to shares subscribed in six months. By-law nineteen providing that surplus money should be offered at auction, and the stockholder bidding the highest premium should be awarded a loan of $200 on each share. By-law twenty-one requiring the borrowing stockholder to pay 6 per cent interest on his loan in monthly installments, also the monthly premium. By-law twenty-six providing that borrowing stockholders might withdraw at withdrawal value one or more shares of stock on repaying $200 on each share; or might repay the loan and continue their stock. By-law thirty fixing the withdrawal value at the amount of dues paid in and 60 per cent of the profits shown at the last preceeding semi-annual statement. By-law thirty-three providing that a series should dissolve and cease when the shares reached $200 in value, and a borrower be then entitled to cancellation and release.

The answer then went on to allege that the association issued a series of stock each six months, February and August of each year, and Montgomery subscribed to eleven shares of stock in the ninth series beginning February, 1893, and in March of that year bid a premium of 70 cents per share for an advance of his eleven shares, gave his bond and deed of trust, and paid his monthly dues, interest and premium to July, 1903, and remained all that time a stockholder with all privileges. That the semi-annual statement was duly issued showing the value of each share in

each series; said statements being accessible to each stockholder.

That on July 31, 1903, each share in the ninth series was worth $126 dues paid in and $44.09 profits, and said Montgomery was entitled to withdraw by receiving back the dues and 60 per cent of the profits, entitling him at his election to make the withdrawal ($1,677 in all) or to continue to pay for two or three years longer, when his shares would reach par value.

That while the word "loan" is used in the by-laws it was really an advance of his $200 per share; that the association was organized and the transaction had on the faith of the long settled law in this District, as determined by the highest courts thereof, that it was fully legitimate and authorized by law. That the association always consisted of a large number of shifting stockholders and had reached its twenty-sixth series, and all up to the 19th series had been settled in full, except that in some of them the borrowing stockholders still remained; that the amount received from Montgomery had gone into the settlement with the stockholders paid off, of which said Montgomery and appellee were well aware, and that they are estopped for that reason to claim any refund, whatever might be their rights to stop further payment; and that Montgomery in the calculation of the profits had been given the benefit of payments on other similar loans or advances made to other stockholders, and was informed at the time of the original transaction of such result.

An answer of Montgomery was filed, which is in substance merely an admission of the allegations of the bill. No replication was filed, and the cause was submitted on the pleadings and a stipulation as to facts, which only changes the pleadings to the extent that it is admitted that the purchase was made by Montgomery for appellee, and that appellee arranged for insurance and made payments by his check, through letters speaking of it as the Montgomery loan, said Montgomery being his employee in a mercantile business; that said association never had any notice except as above, until July 29, 1903, that appellee was owner; that neither appellee or Montgomery had any fur-

ther or other connection with the association than the transaction above stated.

Attached to said stipulation there was a copy of the by-laws, but they seem to show nothing further material to the case than those set forth in the answer, except Sec. 10, which provides, among other things, that the secretary "shall furnish a financial exhibit of the association every six months or oftener if required."

The stipulation further attaches the semi-annual statement of July 31, 1903, (corresponding with the allegations in the answer) and admits that similar statements were issued every six months correctly stating the value according to the by-laws, reserving the question to the court of the effect of the by-laws, and appellee admits having received a statement of July 31, 1901, showing the value of each share of 9th series at $129.33. Also a letter of Barber & Ross, to H. K. Simpson, Secy., of date Oct. 4, 1893, enclosing check for two months dues on this real estate. Also a letter from H. K. Simpson, Secy., of date March 17, 1894, to Barber & Ross, acknowledging receipt of $29.70 dues on G. W. Montgomery loan and stating terms on which loan can be reduced to $2,000, and about placing insurance on the property. Also attached to the stipulation is a letter of Mar. 16, 1903, to the association, written on a letterhead of Barber & Ross, and signed George W. Montgomery per R., asking for a statement of his loan and stating that he thinks the amount paid on the indebtedness should have been fully paid before this. And a letter of May 28, 1903, in the same form, asking for an itemized statement of his account and a copy of the bond and by-laws; to which is attached "statement sent and other papers can be seen at office."

On the hearing on the pleadings and this stipulation, on June 24, 1904, the court rendered a personal decree against the directors, individually, for $867.86 with interest from Oct. 21, 1903, the date of the filing of the bill; and directing the officers and directors of the association to cancel the stock, and cancel the bond and surrender it to appellee; and directing the trustees to execute a release to appellee, etc. From this decree this appeal is taken.

The questions involved are whether the appellee could maintain the action on sealed instruments executed by an-

other person, although shown to be appellee's agent; whether the contract sued on was usurious; whether there could be any recovery over for usury not paid within a year; whether the directors were personally responsible for usury paid to the association; and whether the court could decree a release to appellee when the title stood in another.

They all arise on the whole case and the final decree, the cause having been submitted on the pleadings and an agreed statement of facts.

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the appellee could recover in this action at all; he not being a party to the sealed instruments, the basis of the action.

2. The court erred in rendering a personal decree against the appellants, the directors of the association.

3. The court erred in holding that the contract was usurious.

4. The court erred, even if the contract was usurious, in rendering a decree for usury paid more than one year before the filing of the suit.

5. The court erred in directing release to be executed to appellee.

APPELLEE HAS NO RIGHT TO SUE.

It is a well settled principle of the law that no one except the parties to a contract have any right to sue under the contract.

An exception is made, but it must be remembered that it is but an exception, that in certain cases the principal has a right to sue or can be sued on a contract entered into by an agent; and this exception extends only to simple contracts,—not to sealed instruments. Here the right to relief is sought under two sealed instruments—the bond to Herrell, the treasurer (p 4), and the deed of trust to Walker & Weller (p 5).

While it is immaterial, as we will show later, whether the supposed agency was known or unknown, yet the stipulation of facts shows (p 14), that the agency was never made known to the appellants until July 29, 1903, over ten years

after the contract; and that as late as Mar. 16, 1903 (p. 26), and May 28, 1903 (p 27), Montgomery was, by the hand of Ross, writing letters recognizing and stating the loan as his own.

In 1 Parsons on Contracts Ch. 3, Sec. 6, p. 62, it is said:

> "In contracts by deed no party can have a right of action under them but the party whose name is to them; but in the case of a simple contract an undisclosed principal may show that the apparent party was his agent and may put himself in the place of the agent."

And in 1 Am. & Eng. Enc., 423, discussing the right of the principal to sue on a contract made by the agent; after setting forth that "It does not matter whether the principal is disclosed, or not nor that the agent in the transaction was considered to be the principal," the note, p. 425, adds: "This rule does not apply to contracts under seal or negotiable instruments signed by the agent in his own name, although acting for a principal"—citing some fifteen or twenty authorities.

> "It is a strict rule of the common law that only the parties named or described in a sealed instrument can sue or be sued upon it. This rule applies equally to a principal who is disclosed in the negotiation, but whose name and seal are not effectively fixed to the instrument."

Huffcut on Agency, Sec. 127.

> "When a sealed instrument names the agent alone as the obligee, the principal can not maintain an action upon it in his own name, owing to the technical rule that only the parties named or described in a sealed instrument can sue or be sued upon it. He must proceed in the name of the agent."

Ibid Sec. 134.

> "When an agent makes a contract under seal in his own name, the agent alone is liable on the contract, whether his principal be known or unknown.—Nor is there any remedy against the principal even in equity."

Ibid Sec. 188.

The reason given for this doctrine, as laid down in all the authorities, is that to allow one not a party to a sealed instrument to sue or be sued on it would be to substitute a simple contract by or with a third person for a sealed contract by or with another.

Indeed the doctrine itself is conceded by appellee's counsel to be indisputable, but it is sought to avoid its application to the present case by the contention that it does not apply in equity. No authority has been cited for this contention or distinction, beyond references to what are stated to be the general principles of equity to go to the root of all matters, and form and reform contracts at will.

Passing by the absurdity of applying such general rules to a case like the present, where the reformation sought is to make the contract read as only one of the parties understood it, there is still no sound reason why the doctrine so unequivocally and repeatedly stated by Mr. Huffcut in his admirable work should not apply to equity as well as law. And there are at least three well considered cases in which courts of three separate jurisdictions have held that it does.

Briggs v. Partridge, 64 N. Y., 357, was an action in equity brought to enforce a contract for purchase of land made by an agent and signed and sealed by an agent, in his own name, and it was held that it could not be maintained against the person alleged as principal.

Borcherling v. Katz, 37 N. J. Eq. 156, is perhaps even a stronger case, for there the plaintiff sued in equity the principal in a bond signed by the agent alone, on the distinct ground that he had no relief at law and that defendant had received the benefit of the contract made by his agent, and the court held that no equitable action would lie.

In Re Pickering's Claim, L. R. 6 Ch. App. 525, was an English case of equitable settlement of an insolvent estate, decided by the Court of Chancery Appeal, in which Pickering sought to charge the estate with a sum received by the insolvent on a bond executed by its agent, and the court rejected the claim under the rule stated.

Another contention is that the case at bar is like Loan Assn. v. Baker, 19 App. D. C. 1, where the court affirmed a decree in favor of a subsequent vendee of the land charged with the loan. In that case the decree over was for an in-

significant amount, and the question turned on whether a third person could recover usury on a contract not made by him but which he afterwards assumed. The applicability of the rule as to sealed instruments was not touched upon, and the court sustained his right to sue on the sole ground that he had been recognized and dealt with by the association, his money accepted, and an estoppel thereby created. A case easily distinguishable from the present one.

Nor can it be soundly said that this is not an action on the instrument, but to cancel it and recover over. It might well be that Mr. Ross, if he had had the title subsequently conveyed to him, could sue for the release of the trust made by Montgomery, if the debt had been paid, and this entirely independent of the question whether Montgomery was his agent or no. But his is a far different case; he has never received conveyance, and the gist of his action is the cancellation of the bond and an accounting under it. Under all the rules of law the obligee can not sue Ross on Montgomery's bond, and to permit him to sue the obligee would be such a breach of the mutuality required in respect of the enforcement of contracts as to strike with amazement the judicial sense.

APPELLEE COULD NOT RECOVER FOR USURY.

We do not mean by this subhead to question the right of a proper suitor in a case of accounting like this to have set off his payments against the debt; that doctrine has been affirmed by our local courts, in conformity with the general principle that equity has right to relieve a usurious contract on certain terms. But those terms are, uniformly, that the complainant must tender himself ready to perform equitably the contract. These may be extended to a case where he seeks a cancellation of the obligation because he has already paid it in full, after deducting the usury, and thus the necessity of an equitable tender is dispensed with; but no case in equity can be found in which it has been held that not only can he get such relief but also recover of the defendant usury overpaid.

Suppose it could be done; we are then confronted with our local statute, Sec. 1181 District Code, which, in giving

the right to recover usury, adds: "provided said suit be begun within one year from the date of such payment."

> "Since the illegality of usury is wholly the creature of legislation the provisions of the statute must furnish the rules determining the extent, limits and occasion of relief."
>
> Pomeroys Eq., Sec. 907.

It was not necessary to plead any statute of limitations, since, as we have seen, the statute conferring the right expressly limits it to suits brought within a year after the payment.

The ninth paragraph of the appellee's bill (p. 3) complains that the "premiums" were usurious, and, when read in connection with the eighth paragraph, it is evident that he means also to say that the monthly interest was also usurious, when it is considered that he was making monthly payments on the principal and still paying interest on the whole. So that, so far as the recovery over given the appellee, the action must be regarded as one plainly for the recovery of usury. Now it is evident that a very small portion of this was paid within a year before suit brought; nothing but the premiums and a deduction from the monthly interest because a portion of the principal had been paid. To October 1, 1902, there had been paid on the principal 116 months' installments of $11 each, making $1,276; there would still remain owing $924; nine months' payment of interest on that, to July 1, 1902, when the payments ceased, would amount to $41.58, and the appellee having paid $99 he had only paid $57.42 usury, which added to the $69.30 paid in the nine monthly installments of premium would make, say $127, which he had paid within the year before bringing his suit. And yet he was decreed $867.86.

The appellee's counsel concede that under the opinions of this court in Presbrey v. Thomas, 1 App. D. C., and Lawrence v. Bldg. Ass'n, 7 App. D. C., and the opinion of the U. S. Supreme Court in Carter v. Carusi, 112 U. S. 478, the one year statute applies and gives the only right to a debtor to recover usury; but they seek to avoid its effect by a contention that this is a case of account and limitation runs only from the date of the last payment on account.

Now, in the first place, that proposition is too broad even as to an ordinary account.

> "If the account is all upon one side and the statute has run upon some of the items the account is not mutual and only those upon which the statute has not run can be recovered."
>
> Wood on Limitations, Sec. 278.

In the next place, payments of usury are not to be placed on the footing of an account.

> "Every time the plaintiffs paid the defendants usury a cause of action accrued, against which the statute immediately commenced to run; and consequently the plaintiffs can only recover the illegal interest actually paid as such within six years next before the commencement of this suit."
>
> Albany v. Abbott, 61 N. H. 157.

In that state the statute was six years, and the opinion cites Breckinridge v. Churchill, 3 J. J. M. (Ky.) 16, and Davis v. Converse, 35 Vt. 503, to the same effect. And in this connection we may also refer to Sec. 168 of Wood on Limitations expressing the same view.

It is thus apparent that if the appellee could recover any usury at all, his recovery must be limited to what he had paid within one year, and what was given him was grossly excessive—to the amount of at least $700.

THE CONTRACT WAS NOT USURIOUS.

To treat of this point we call attention to the by-laws, and the action taken or had by Montgomery under them. The preamble recites that the object of the association is to receive from and loan to stockholders its funds, subject to the by-laws; Sec. 3 provides for periodical meetings the first Wednesday of each month; Sec. 10 provides, among other things, for the secretary to furnish a financial exhibit of the association every six months; Sec. 17 requires each stockholder to pay $1.00 per month on each share; Sec. 18 provides for the issue of stock in a series every six months; Sec. 19 provides for loans to stockholders bidding the high-

est premium, payable monthly; Sec. 21 requires the payment of monthly installments of interest; Sec. 26 gives borrowing stockholders the privilege to repay a loan at any time, or any part thereof not less than one share ($200), and either receive the withdrawal value of his share or continue his shares; Sec. 30 fixes the withdrawal value at the amount paid in on stock and 60 per cent of the profits as shown by the last semi-annual statement; Sec. 33 provides that each series shall dissolve when the value of the shares has reached $200, and in case a loan has been granted the member in that series shall get a release. These by-laws are found on pages 18 to 25 of the printed record.

It is submitted that nothing in the contract of Montgomery makes this transaction usurious. The scheme or plan, briefly stated, is that a certain number of individuals meet and organize, without incorporation, a joint stock company, agreeing that others may come in every six months; each one to participate alike in the profits and losses, one measure of the profits to be according to the amount paid in, the payments being monthly. That each stockholder should have the right to borrow to the extent of the par value of his stock, $200 per share, to-wit: that is, getting an advance payment of his stock on certain terms, to wit: to pay the interest on the advance, and, in view of competition between stockholders, to give the advance to such one of the competitors as willing to pay the highest monthly premium, —no loans to be made to others than members of the association. Every six months a statement of the financial affairs of the association was to be made, and every stockholder was awarded his share of the profits earned from the interest and premium on loans,—the sole source of profit. There was no distinction between borrowing and non-borrowing stockholders; either one could withdraw at any time, but of course the borrowing stockholder if he wished to withdraw must pay back the money he had borrowed. The only limitation on withdrawal was that instead of getting the full profits the withdrawing member could only get 60 per cent thereof; a reasonable regulation in view of the fact that there might in the future be losses diminishing the profits, or as an inducement to the stockholder to continue his stock rather than diminish the assets of the asso-

ciation. All of the cases decided by this court condemning contracts with building associations as usurious, where they were somewhat in the nature of the contract here involved, were cases of corporations and not joint stock companies, which are, as between the members, partnerships.

As we shall show presently, under another head, the highest court of this district in a series of cases running over a long term of years had recognized the validity of like contracts in cases of voluntary associations, and we do not understand the cases in this court, on which counsel for appellee rely, to conflict with this doctrine. While there is a hopeless conflict of authorities in the several states on this question, yet all denouncing such contracts as usurious seem to relate to cases of corporations.

In Louisiana is the only relevant case of a voluntary association, and there we find the court saying:

> "The society in this case having been organized prior to the adoption of the statute authorizing such association, it remains for us to consider the status of an unincorporated association. They are said to be partnerships only. and that their acts are to be judged by the law applying to persons.
>
> "In applying this law the courts will allow themselves to be guided by the rules which were adopted by the members in forming the association, whose binding efficacy, they, in joining it, have either formally recognized and subscribed to, or precluded themselves from denying by their participation in the society's business and profits under these rules. These are analogous to articles of copartnership entered into between the different members, and the reciprocal rights and duties under them so far as they are countenanced by law, are protected and enforced by the courts as in the case of voluntary benefit association to which they bear a close resemblance."
>
> American Homestead Co. v. Linigan, 46 La. Ann. 1129. Decided Dec. 20, 1893. Rehearing refused May 30, '94, citing also,
>
> Delano v. Wild, 6 Allen, 1.

In Bedford v. Building Assn., 181 U. S. 227, it was held

that when the borrower remained an actual stockholder to the end, unless he elected to withdraw his stock and he merely pledged his stock as collateral security, there was no usury. Citing Spain v. Hamilton, 1 Wall. 604, to the effect that when the supposed usury depends on a contingency it is no usury at all.

In the case at bar there is no claim that the borrower surrendered his stock, or even pledged it, unless the latter be inferred from Sec. 25 of the by-laws (p. 23), where it is provided that he shall assign it "as collateral;" which the U. S. Supreme Court, as we have seen, has said forbids the idea of usury.

Another point to be considered in this connection is that under Sec. 714 R. S. D. C., in force at the time of this contract, it was competent for a borrower to contract in writing to pay 10 per cent for the loan of the money. The contract here involved, adding the premium, is for 10 1-5 per cent, and it is suggested that the maxim *de minimis non curat lex* might well be applied. At all events it is evident that the profits necessarily and actually coming to the borrower were more than sufficient to cancel the small excess. It is admitted (p. 15) that when he had on July 1, 1901, paid in $102 each share was worth $129.33, making a profit of $27.33, nearly 2 per cent per annum on $200; and that on July 1, 1903, the profits were $44.09, a little more than 2 per cent; so it is beyond dispute that when are considered all features of the contract the borrower was not paying and never agreed to pay as much as the ten per cent allowed by law.

STARE DECISIS APPLIES.

It is alleged in the answer that the association was organized and the transaction involved was had on the faith of long settled law in this district, as determined by the highest courts thereof, that such transactions were fully legitimate and authorized by law (p. 11). No replication having been filed this portion of the answer is to be taken as true, the stipulation as to facts containing an agreement that the cause should be heard on bill and answer except so far as the stipulation modifies the pleadings (p. 14), and there being no modification on this point.

In Johnston v. Clarke, 2 Hayward and Hazelton (D. C.), 258, the old circuit court in 1857 held contracts like this not usurious. In Pabst v. Econ. Bldg. Assn., 1 MacA., 385, decided in 1874, the general term of the supreme court of the district took the same view; also in Mulloy v. Bldg. Assn., 2 MacA. 594, except as to fines (which are not here involved), and in Burns v. Met. Bldg. Assn., 2 Mack. 7, the same doctrine was recognized. And on a later hearing of the last named case, 3 Mack. 333, decided in 1884, it was announced, reviewing and approving all these cases, that a contract could not be held usurious where the stockholder's liability is contingent and he shares in the profits.

This was then the condition of the law, as declared by the highest courts of the jurisdiction, in a series of opinions running over 27 years, from 1857 to 1884, and the condition existing at the time of the organization of the association in 1889, and at the time of the contract or transaction with Montgomery, in 1893.

The question of the effect of the doctrine of *Stare Decisis* is perhaps more fully expounded in Wells on Res Adjudicata and *Stare Decisis* than any where else, and we cite from that work, Sec. 589, which says that a *series* of decisions will not be disturbed. Also from Sec. 596:

> "When once a principle has been fully recognized it should not be changed except it is found to be unbearably wrong, or else it is changed by the legislature, to whom the correction of errors ought usually to be left as to long established principles acted on as a rule of property."

Citing:

Sydnor v. Gascoyne, 11 Texas, 455.
Ewing v. Ewing, 24 Ind. 470.

> "When a decision or series of decisions has become a rule of property *or a basis of contracts* it will not readily be changed."

See Sec. 597, citing Rockhill v. Nelson, 24 Ind. 426.

And Sec. 598 adds:

> "Where there is a series of such the rule is usually to

be regarded as absolutely impregnable, except by legislative act."

"It does not need that manifestly a decision or a series of decisions should have actually become a rule of property, or have entered into vested rights, in order to secure for it an immunity from ready changes. It would require a very striking case of present hardship amounting to an irremediable injustice, to overcome even the ordinary presumption that a decision of some length of time standing, capable of becoming a rule of property, has actually done so."

Ibid Sec. 601.

And, as stated in Sec. 611, decisions construing statutes—for instance of usury—are to be treated the same way. In this connection we wish also to cite:

Grignon v. Aston, 2 How. (U. S.) 343.
Welch v. Sullivan, 8 Cal. 188.

The rule of *Stare Decisis* applies to contracts made on the faith of the decisions, and no body but the legislative can change it. Instead of changing the rule laid down in the local decisions the congress, in its first act pertaining to the subject, D. C. Code, Sec. 692, authorizing for the first time the formation of corporations in the nature of building associations, expressly gave them authority to charge premiums.

A proper consideration of that enactment would indicate that congress was advised that it had already been held that associations unincorporated could do so, and it wished deliberately to approve of that view and extend it beyond question to corporations also.

THE DIRECTORS NOT PERSONALLY RESPONSIBLE.

The decree for money is individually against nine of the appellants; it is nowhere alleged that they are members of the association, and nowhere in the bill are they referred to, except in the formal second paragraph (p. 2), where it is stated that they are "directors," "and are sued in their own right and as the representatives of the said association."

Nothing appears in the by-laws requiring directors to be stockholders, and we submit that there was no warrant for a personal decree against them, unless upon the theory that officers of building associations have no rights which borrowers are bound to respect. If it could be presumed that they are stockholders there is no showing when they became such; a very material question as touching their personal liability. Under the particular scheme of this association the stockholders shift every six months, and as the respec tive series are paid off the stockholders in each series receive their money and cease to be members. As shown by the answer (p. 11) the first 19 series had been paid off in full except as to borrowers, whose rights remain; and in paying them off the payments made by Montgomery, or on his loan, entered into the calculation of the amount due and paid them on their stock, of which Montgomery and appellee were well aware, and they are therefore estopped to now ask against some or all of the present stockholders a judgment for moneys long since paid and distributed. There would be no equity in a holding granting any such prayer.

CONCLUSION.

The decree appealed from should be reversed *in toto* with directions to dismiss appellee's bill. If the court will not go to this extent it should not hesitate to reverse so much of the decree as awards personal judgment.

O. B. HALLAM,
W. M. HALLAM,
Attorneys for Appellants.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1905.

No. 1461.

JAMES W. WHELPLEY ET AL., APPELLANTS,

vs.

SAMUEL ROSS.

BRIEF OF E. H. THOMAS AND F. H. STEPHENS, FOR APPELLEE.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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OF THE DISTRICT OF COLUMBIA.

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JAMES W. WHELPLEY, APPELLANT,

vs.

SAMUEL ROSS.

BRIEF FOR SAMUEL ROSS, APPELLEE.

Statement of the Case.

The case comes into this court on an appeal from a decree of the court below, sitting in equity, adjudging a certain building association loan to be usurious and decreeing the payment of eight hundred sixty-seven 86-100 dollars ($867.86) with interest from July 1, 1903, and costs, to the complainant, the appellee here.

The appellant is a voluntary joint stock association doing business under the title of the Eastern Building and Loan Association, the officers and directors of which are residents of this city. On the 13th day of March, 1893, George W. Montgomery, who is made a defendant to the proceeding, acting as agent for Samuel Ross, borrowed from the said association the sum of twenty-two hundred dollars ($2200.00) and gave as security therefor a deed of trust on parts of lots twenty-three (23) and twenty-four (24) in block seven (7) of "Trinidad," a tract of land located in the District of Columbia. The title to the said land was in Montgomery,

and as evidence of the debt he executed to the treasurer of the said association a bond conditioned to pay to the said association on or before the first Wednesday of every month the sum of two 70-100 dollars ($2.70) on each of eleven shares of stock held by him, in accordance with the constitution of the association. The bond recites that Montgomery had become the purchaser of eleven shares of stock in the said association at a premium of seventy cents monthly per share.

The agency of Montgomery is not denied. Montgomery, in his answer, admits it and that the property belongs to the complainant, and that all the payments made on the said loan were made by Ross. The last payment was made in July, 1903, and on the 29th of that month Ross demanded from the association a repayment of the money alleged to have been usuriously paid, a release of the said mortgage, and a cancellation of the bond. Payment and cancellation were refused by the association and the bill was filed to enforce the same.

The answer denies that the said transaction was a loan and asserts that it was an advance made to Montgomery as a stockholder in the association. The answer sets out the various paragraphs of the constitution of the association deemed applicable to show that the contract is not usurious.

A stipulation of facts was entered into by the parties to the cause, which contains the matters above recited, and that the payments were made in monthly instalments of eleven dollars on account of principal, eleven dollars on account of interest, and seven 70-100 dollars on account of premium, making a total of twenty-nine 70-100 dollars ($29.70) paid each month on account of the said loan; that such payments were made from March, 1893, to July, 1903, both inclusive, a period of one hundred twenty-five months, and the total amount paid being three thousand seven hundred twelve 50-100 dollars ($3,712.50). The by-laws of the association are made a part of the stipulation, as well as the fact that

the association issued semi-annual statements showing the value of the ninth series of stock, the series in question, at their respective dates; but it is not admitted that either Ross or Montgomery received any of these statements, except that Ross obtained from some source at a time not stated a copy of the statement of July 31, 1901, showing each share in that series to be worth one hundred twenty-nine 33-100 dollars ($129.33). Some letters, also, are made a part of the stipulation, but they do not seem to have any important bearing on the case.

ARGUMENT.

1. The Scheme of the Association.

The value of each share of stock at maturity is two hundred dollars. When a loan is made this amount is advanced to the borrower on each share subscribed for by him and payments are made into the association until the stock reaches the value of two hundred dollars. The payments are made monthly, one dollar on account of interest, one dollar on account of principal, and the premium bid for the loan, whatever that may be—in this case seventy cents per share. The interest charged is six per cent and a premium of seventy cents amounts to four 2-10 per cent additional, making a total of ten 2-10 per cent. The stock is issued in series, each series being in effect equivalent to a distinct building association operating on the terminating plan; upon the termination of a series, or before a new series is started, the old one being settled and laid aside. The complainant Ross, or rather Montgomery, was in the ninth series, and at the time of the semi-annual statement of July 31, 1901, was the only member of that series, being the holder of the eleven shares shown by that statement.

There are two classes of members as in other such associations, i. e., the bona fide stockholders and the borrowing members, or nominal stockholders. When the stock in any series

shall have reached the value of two hundred dollars, the stockholders are paid that amount for each share of stock held by them, and the borrowers become entitled to a cancellation of their mortgages and bonds (section 33). "Then the series shall proceed to dissolve, and it shall cease." Section 19 provides for making loans, and section 21 for the manner of their repayment. Section 26 provides that when a borrower repays a loan the stock shall revert to the association.

There is no provision in the by-laws for the payment of profits to a borrower. Section 30 provides that a certain proportion of the profits shall be paid to withdrawing members, stockholders, but this has no application to borrowers.

II. Precedents.

The principle applicable to this case has been passed upon by this court several times.

> Loan and Construction Co. *vs.* Baker, 19 D. C. App. 1.
> Bldg. Asso. *vs.* Fiske, 20 D. C. App. 514.

In Maryland.

> White *vs.* Williams, 90 Md. 719.

In the latter case the court said, and this was quoted with approval by this court in the Baker case, first cited:

> "The premium authorized to be charged by building associations is a sum of money to be paid for the loan in advance, and the stipulation providing for the monthly sum called premium in addition to the legal rate of interest, during the continuance of the mortgage, is not authorized by the statute, but is usurious."

Such a plain statement of the law, twice affirmed by this court, would hardly seem to admit of further argument. The defendant, nevertheless, seeks to avoid the force of this ruling by a series of propositions which we will proceed

to examine separately, and all of which were discussed at length and disposed of by the court below in a full opinion filed in the case.

III. The Defense.

a. The building association contends that the complainant, Ross, can not recover because the contract was made under seal by an agent who was not known to be such.

This is the rule in common law cases, but is not the law in equity. Equity will disregard the form in which the contract was made and look to the substance of the matter, and dispense justice to those parties, and to those only, who are really interested.

1 Pomeroy Eq. Jur., secs. 379 and 383.

This contention is also answered by the Baker case, 19 App. 1, where relief was granted a complainant in a similar case, who was not a party to the original contract, either directly or by agent. He was merely grantee three times removed.

The contention is not supported by the facts. On the contrary, it appears that the association had ample notice of Ross's connection with the matter and received his checks monthly for a period of ten years in payment of the dues. Can it now be heard to say it did not know Ross in the transaction?

b. The association invokes also the bar of the statute of limitations of one year. The suit was instituted in October, 1903, within three months after the last payment was made. On the familiar doctrine of running accounts, it is difficult to see how the statute can have any application. Moreover, both in the Baker and Fiske cases recovery was allowed upon an accounting covering seven or eight years in the former case and about two-and-half years in the latter, the bill in each case having been filed within a few months after the date of the last payment.

c. The appellant contends further that the decisions cited by him from the old District cases constitute a rule of property and should be followed in the present case.

This hardly need be answered. The contention is that a decision once made can not be overruled.

d. The association says, also, that the decisions heretofore made by this court and the courts of Maryland do not apply to this case, because the defendant is not a corporation, but a joint stock company.

The question, however, is not to be determined by the character of the parties to the contract, but by the nature of the contract itself. That the appellant is a joint stock company does not give it the power to make a usurious contract in plain violation of law. This question was touched upon by this court in Armstrong v. Bldg. Asso., before referred to, where the court said:

> "If a shareholder in a voluntary association or a stockholder in a corporation becomes also a borrower from the body and yet retains to the fullest extent unimpaired all the rights of a shareholder or stockholder . . . it may be proper . . . to segregate the rights and liabilities of the debtor, so that the stockholder, who is a debtor, should not be given an undue advantage over other stockholders."

In the present case the complainant was never a stockholder, except in a merely nominal sense. His holding of stock began when the loan was made, and ended when his loan was paid, or would have been ended had he continued to pay until that time.

The defendant association, however, claims that the complainant was entitled to share in the profits earned by it and that, by reason of this fact, there was established a partnership between them.

Admitting, for the moment, that the complainant was entitled to participate in the profits of the association, that

fact of itself is not a bar to the complainant's right to recover. In the case of Building Association *vs.* McCarthy, 57 Md. 555, the court, in declaring a building association contract usurious, says:

> "In this case the society is not to terminate, but the contract of the mortgagor is to end and his obligation to pay is to cease, and his mortgage to be released so soon as the amount paid by him as bi-weekly dues, together with the profits on his redeemed stock shall amount to the sum advanced to him. Notwithstanding the redemption of ten shares of his stock, the appellee continued to be a member of the association, entitled to share in its profits and to receive dividends upon the shares so redeemed, in the same manner as if no advance had been made thereon."

See, also, Loan Asso. *vs.* Ballinger, 12 Rich. Eq. 124.

There is not a syllable in the record, however, that gives the complainant that right. Section 30 of the by-laws does provide for the payment of 60 per cent of the profits of each share *to withdrawing members.* This is not the case at bar; no withdrawing member is before the court, and, as the court said at the hearing below, a member can not be compelled to withdraw. This section, plainly, can have no relation to those borrowing from the association who have nothing in the association. What could they withdraw? The association owes them nothing; on the contrary, they are in debt to the association and must continue their monthly payments or submit to have their mortgages foreclosed.

Moreover, the partnership phase and the participation in profits are not peculiar to this association. They are features of every building association, whether incorporated or not, and are the features on which are based the case as found in the early English, Maryland, and District cases. But notwithstanding these features, the courts in Maryland and the

District now hold building associations subject to the usury laws. How, then, can their appearance in the present case aid the defendants?

e. The defendant association argues, further, that as the law permits contracts calling for ten per cent interest, and as the present contract provides for only ten and two-fifths per cent, the court will disregard the two-fifths over the permitted legal rate, on the principle of *de minimis non curat lex.* We do not believe it necessary to notice this argument further than to say that it calls for the substitution of a contract by the court in place of the one made by the parties. But the parties made no such contract. The contract entered into called for the payment of six per cent as interest.

f. Counsel for the defendant association contend, also, that this case is to be governed and controlled by the case of Bedford *vs:* Bldg. Asso., 181 U. S. 227. The contention is not a new one in this court. The point was raised in the Fiske case, 20 D. C. App. 514, and disposed of there. The court says:

> "The facts of that case (meaning the Bedford case) were very different from this. They are not fully stated in the report of the case, but sufficient appears to show that the subscribers to the stock of the association remained actual stockholders until the end, unless they elected in the meantime to withdraw their stock; that the mortgage contract was a separate and distinct thing, wherein notes were given for the indebtedness, to be paid as they matured; and that the pledge of the stock, which accompanied the mortgage, was merely a collateral security and not in effect a transfer of it to the company with which, as we said in the case of Armstrong *vs.* Building & Loan Association, 15 D. C. App. 1, it served merely as a measure of the payments to be made. The stockholder did not cease to be a stockholder by becoming a debtor to the association."

The Bedford case decided two points, neither of which appears in the case at bar:

1. That a contract for a loan made with a building association can not be impaired by subsequent legislation.

2. That a loan made by a building association which is not usurious in the State where the association is domiciled and where the obligations are payable can not be attacked for usury in the State where the mortgaged property is situated.

In that case the loan was made in the State of New York and was protected by the laws of that State against the taint of usury. When attacked in Tennessee for usury the court said the contract must be construed according to the laws of New York.

In the present case counsel contend that the stock was retained by the complainant and was not even pledged as collateral. There is nothing in the record to support this statement. Section 25 of the by-laws of the defendant association requires that the stock shall be assigned as collateral for the security of the loan, and section 33 requires that when the loan is paid the stock shall be cancelled. It is apparent that the complainant had no control over the stock alleged to have been issued to him from the time of the loan to the time when, had the payments continued, it would have been cancelled.

The decree of the court below was correct and should be affirmed.

Respectfully submitted.

E. H. THOMAS,
F. H. STEPHENS,
Solicitors for the Appellee.

IN THE

Court of Appeals of the District of Columbia

JAMES W. WHELPLEY, ET AL., *Appellants*,
vs.
SAMUEL ROSS, *Appellee*.

No. 1461

PETITION FOR MODIFICATION OF OPINION.

O. B. HALLAM,
W. M. HALLAM,
Attorneys for Appellants.

IN THE

Court of Appeals of the District of Columbia

JAMES W. WHELPLEY, ET AL., *Appellants*,
vs.
SAMUEL ROSS, *Appellee*.
} No. 1461.

PETITION FOR MODIFICATION OF OPINION.

Counsel for appellants feel constrained to ask the court for a modification of its opinion, so far as it directs a release of the deed of trust; not only because it takes from the building association a right to require further payment as condition of such release, but also because the opinion, when placed in the official reports, will stamp the appellants as having made unfair discrimination between stockholders, and unjustly required one man to pay more than others in the same situation.

The relevant portion of the opinion is based on the assumption that all stockholders in the 9th series, except Montgomery, had received $200 for their shares.

What Ecclesiastes calls "the conclusion of the whole matter" is thus stated on page 19 of the court's manuscript opinion:

"We cannot understand how, under the scheme of this association, the shares of one man alone, the only stockholder remaining in the series, can have only reached the

value of $170 a share, when all the other stockholders have received their shares in full."

The two or three immediately preceding pages of the opinion show that the court has proceeded en the idea or theory that the other stockholders of that series had each received $200; that idea or theory we submit would not have been adopted had it borne in mind Sec. 20 of the by-laws (Rec. pp. 21, 22.)

"When advances cannot be made for a premium of 30 cents, or loaned under the non-participating stock plan, the board of directors shall be authorized to *redeem* stock in the oldest series as follows: To the value of a share, as given in the last (semi) annual report will be added, first, the amount of regular monthly payments on the share since the date of said report; second, the amount of interest, at the same rate of interest as allowed on withdrawals, that has accrued since the date of said report upon the tota payments on such share, *the aggregate of which amounts shall be announced as the actual value of such share.*"

The "annual statement" evidently relates to a semi-annual statement such as filed after page 24 of the record; since, under Sec. 10 of the by-laws (Rec. p. 19), the secretary is to furnish a financial exhibit every six months. But whether it be annual or semi-annual is immaterial, it is evident that what is meant by section 20 is, that when the association is incumbered, by income from all sources, with an embarrassment of riches that it cannot lend out to its stockholders, none of them asking for a loan, the association can *redeem* stock in the order of the age of the series; and compel the stockholders in any such series to take the then value of the stock of such series, and retire.

So that what is really meant, and all that can legitimately be inferred from the record, is that when the appellants in their answer say that such stockholders have been paid in full, it means, not that they received $200, but that they received what was due them according to the last semi-annual statement; which it is evident, must have been much less than $200.

Coming back to the court's statement in its opinion, about the difficulty of seeing how the shares in the 9th series could on July 31, 1903, have only reached the value of $170, while all other stockholders in the same series had been paid off in full, and taking up in that connection the other correlating expressions or suggestions of the court we beg leave to say:

That the court refers to Section 33 of the by-laws (Rec. p. 25). We are free to admit that that by-law peculiarly and inartificially states the case, and that by a very strict construction it would seem that if everybody in a series had borrowed out his money all would be entitled to a release.

But your honors can see the absurdity of any such strict construction. Let us assume that there is only one, or maybe two or three persons, who take stock in a certain series, and all borrow their shares out in full, necessarily getting their money from that paid in on other series, then by such strict reading, a man who had not paid in more than $1 and had got $200 would immediately be entitled to a release. The words in that section "or whenever loans to the full amount of every share of stock shall have been made" are clearly surplusage; or, at all events, considered in connection with the first and last clauses of the section, mean that when a share in the series reaches, by the progress of the association, $200 in value, the non-borrowing stockholders shall be paid their $200—and the man who has borrowed $200 on his share shall have a release of his trust or mortgage; because the association now owes him that much, by reason of his having kept up his payments both of dues and the interest and premium he agreed to pay for the advance.

Falstaff says: "In a state of innocency Adam fell; and what should poor John Falstaff do in the days of villany?"

So we may say that if the learned framers of our constitution have put forth serious problems as to the meaning of the general welfare and the interstate commerce clauses, the unskilled framers of a series of by-laws for a building

association are excusable for making a by-law that is not perfectly clear.

The court says, in its opinion, that the allegation (by appellants) that the non-borrowing stockholders have all been paid off in full "necessarily implies—that their stock had fully matured and had reached the full value of $200 a share."

It is unnecessary to consider whether if such allegation was unqualified that implication might be made as an assumption of fact. For while the answer says that in certain series, including the 9th, all the non-borrowing members have been paid off in full, it is immediately followed (Rec. p. 11) by this further allegation: "These series were settled by reason of the accumulation of funds for which no bids were made and which the association was therefore unable to loan or advance to stockholders."

Although Sec. 20 of the by-laws (Rec. pp. 21, 22) is not embraced in the answer, it is made part of the stipulation of facts, and the sentence we have quoted from the answer evidently relates to it. Construed together, what they mean is that the non-borrowing stockholders when paid "in full," were paid all they were entitled to under this by-law when the stock was redeemed.

The court's assumption that they were paid $200, we submit is not well founded. There are but two sections of the by-laws, Sec. 19, relating to loans or advances, and Sec. 33 relating to dissolution, that mention $200 in connection with a share of stock; the one authorizing a stockholder to borrow or get an advance of $200 on each share, and the other, in a sense, fixing, not an absolute, but a maximum value; or rather a limitation compelling the stockholder to receive $200 whenever his stock reaches that value. At what date the non-borrowing stockholders in the ninth series were paid off does not appear, nor is it material. Whenever it occurred it is evident that they could not have received $200. By Sec. 20 they were only entitled to receive what they appeared to be entitled to by the last semi-annual statement; and it is evident, not

only from what we have to say later as to the progressive value of the ninth series, but from the statement. (Rec. No. 28) that the seventh series, a year antedating the ninth series, had not reached that value on July 31, 1903, since it is stated at $191.28.

When the court scans that statement it will observe that the present value of each series stands in the order of its age, giving first, as part of its value, the amount paid in as dues, and second the amount of profits, which are in proportion to the age of the series; that is, number of years they have been paying in. Such values are evidently, almost necessarily, progressive and grow from year to year. There can be no fluctuations unless it should happen, which is very unlikely, almost impossible, that the association should meet with some heavy and unexpected loss.

There is carried in that statement as an item of the assets, $4,261.17 as due from members on account of dues, etc. Should it happen, for instance, that in this case the amount later carried as dues from Montgomery, is wiped out by decree of this court, it might have the effect of reducing *pro rata* the assets and the amount of profits under the next semi-annual statement. Or if there should happen in any other way a loss of a great portion of its assets, as by a recovery against it of a money judgment, or recovery from it of real estate it holds; either as security or absolutely, the value of stock might be less than the last semi-annual statement. But no such condition has arisen, nor is it likely to arise, and the record shows that the stock progressed in value each half-year.

One other point that the court states in its opinion requires notice.

It says, "There are statements that at certain dates it (the stock) was worth a certain sum; but there is no means of verifying the accuracy of these statements."

The truth of these statements is admitted and there was no need of "verifying their accuracy." On page 15 of the record, (lines 28, 29 and 30) it is stipulated that "the said statements state the value of the respective series, according

to the by-laws." Using this stipulation according to Webster's definition of the words, it means that they state (set down in detail or in gross) the value (the amount of money agreed on as an equivalent) of the respective series according to (in conformity with) the by-laws.

And the court says in its opinion that the appellee was bound by these by-laws.

With the design, which we feel sure the court will commend, to avoid the taking of testimony which might cost hundreds of dollars, this stipulation was made as to this and other facts.

It was not deemed necessary to submit every semi-annual statement, but it is agreed (Rec. p. 15, lines 31 to 33) that the statement of July 31, 1901, showed the value of the ninth series of stock at $129.33—evidently $102 dues paid in and $27.33 profits—this being the only antecedent statement that the appellee admits having actually received. If the court will compare this with the statement of July 31, 1903, it will observe that the value of the 13th series, (issued two years later) almost tallies with that of the 9th series two years before; the one being $129.38 and the other $130.93, so small a variation as to clearly show that such statements are fairly and honestly made and are reliable, even had they not been admitted to be correct.

The court dwells somewhat on the fact that the appellee had paid in $3,712.50, or omitting premiums $2,750—when he had only drawn out $2,200—and intimates that because he had paid back at least $2,750 for his $2,200 he ought to have his stock cancelled and his mortgage released. If the court would base an opinion, directing a release, on this ground only it would relieve the appellants from the charge of unfair dealing. But evidently it could not do so. This proposition wholly overlooks the fact that what is paid beyond the regular dues that each stockholder pays, whether borrower or not, is paid as interest for the man's getting his money long in advance of the time it is due him. That he can return same at any time and con-

tinue his stock—see last clause of by-law 26. (Rec. p. 23)—and that if he elects to continue to hold the money advanced him the measure of his claim against the association is not, as the court vaguely suggests, what he has paid in as interest to be added to what he has paid in as dues, but what his shares have earned *as profits*, according to the semi-annual statements. If the idea were to be carried out that as soon as the payments of dues and interest amounted to the face of the sum borrowed, though after many years, it would amount to a borrowing without interest. This would not only be in direct conflict with the by-laws and the contract made in conformity therewith, but in conflict with the rules governing the ordinary contract of borrower and lender. It wholly ignores the mutual agreement between the many stockholders, that one who borrows $200 on his share many years in advance of the time he could get that much, if indeed he ever could unless he borrowed it, must pay so much for that privilege.

We beg leave also to suggest that the borrowing member in a series has a certain advantage over the non-borrower. He can get his $200 by paying his interest and premium and need not refund until the accumulated profits with his dues make his share worth $200. The non-borrower is compelled to take back his money with accumulated profits, under Sec. 20, long before it reaches $200. The borrower cannot be compelled to do this but has the *privilege* of so doing at any time.

In the case at bar, by his bill filed Oct. 21, 1903, the appellee tenders himself ready and willing to pay whatever further sums may be due, if any, to the association on account of the loan. (Rec. p. 3). On July 31, 1903, his 11 shares of stock were worth $1,870.91, leaving a balance of $329.09 due on the $2,200 borrowed. On October 21 he had fallen in arrears three months dues, interest and premium—the dues need not be added, but the interest and premium $18.70 per month, making $56.10 should be added to the $329.09; this makes $385.19 with interest from Oct. 21, 1903, that the appellee should be required to

pay before he gets his release, and we respectfully ask the court to so modify its opinion. If done it follows that costs should also be adjudged to the appellants.

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Attorneys for Appellants.